IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Reportable

Case No: C695/09

In the matter between:

DR VADIVAL GOVENDER Applicant

and

MINISTER OF DEFENCE Respondent

Judgment

Molahlehi J

Introduction

[1] This is an urgent application in which the applicant seeks to have his suspension from work uplifted and the intended disciplinary action suspended pending the application concerning protected disclosure which the applicant intends filing with this Court. The application which is opposed was postponed at its last hearing to the 2nd October 2009, with a directive to the parties to file their relevant papers including heads of argument. The applicant seeks an order on the following terms:

"1. Dispensing with the forms and service provided for in the Rules of Court and allowing this matter to be heard as one of urgency-;

2. That a rule nisi be issued calling upon the Respondent to show cause, if any, on a date to be determined by this Honourable Court why an order should not be granted in the following terms:

2.1 Declaring that the Applicant's suspension with effect from 26 August 2009 is invalid and that the Applicant is permitted forthwith to resume his duties upon terms and conditions no less favourable than existed on 26 August 2009;

2.2 ...

2.3 *Interdicting and restraining the Respondent from taking any disciplinary action against the Applicant pursuant to the notice of a disciplinary enquiry dated 11 June 2009, pending the final determination of proceedings to be instituted by the Applicant within 20 days of the date of this order setting aside the said disciplinary enquiry;*

2.4 ...

2.5 *Costs of suit."*

Background facts

[2] The applicant who has 25 (twenty five) years experience in the health sector is one of the two specialist anesthesiologists in the employ of the respondent and the deputy head of the Department of Anesthesiology at 2 Military Hospital, in the Western Cape, was suspended by the respondent with effect from 26 August 2009. In these proceedings the applicant seeks to challenge and have that suspension set aside because according to him he was not given a hearing. The applicant also seeks an order staying the disciplinary proceedings initiated against him, pending the finalization of the proceedings he intends instituting against the respondent which would concern the protected disclosure which he had made regarding the management of the financial affairs of the respondent by some of its managers. The applicant is part of the management team of the respondent.

[3] It is not disputed that the applicant has made a disclosure regarding financial irregularities in the affairs of the respondent and such disclosure was made to the Surgeon-General on 22nd August 2008. According to the

applicant, he made the disclosure after unsuccessful attempts of persuading the management of the respondent to address such alleged irregularities. Following that confidential disclosure a firm of auditors, Price Waterhouse Coopers, was appointed by the respondent to investigate the allegations made by the applicant. The details of the complaint are not disclosed in the founding affidavit of the applicant. Those details are however not relevant for the purposes of this judgment, save to indicate that according to the applicant they involve contraventions of the Public Finance Management Act 1 of 1999 ("PFMA") and the Treasury Regulations issued in terms of the PFMA as well as the irregular procurement of services. The allegations implicate various high-ranking officers in the military health services.

[4] The applicant's case is that his suspension was a result of the complaints contained in his letter of complaints dated of 22nd August 2008 and accordingly constitutes a protected disclosure as envisaged in terms of the Protected Disclosures Act 26 of 2000 ("PDA"). The scheduled disciplinary action is according to the applicant in contravention the provisions of section 3 of the PDA in that it subjects him to an occupational detriment.

[5] The applicant states his founding affidavit that soon after making the disclosure, during September 2008, a junior nursing staff member who is not an employee of the respondent but contracted as a theatre nursing staff at the hospital, started making contrived and unfounded allegations of misconduct against him. The complaint was finally formalized through the assistance of the head of the nursing sister. The head who was at the time a fulltime employee of the respondent but subsequently resigned is one of the people implicated in the alleged irregularities which the applicant had disclosed to the respondent.

[6] The two people referred to above are Sister McLean and Major Cohen. The complaint which both of them lodged with the respondent concerned inappropriate, unprofessional and sexual harassment on the part of the applicant. For the purpose of this judgment I do not deem it necessary to deal with the details concerning the alleged sexual harassment.

[7] Subsequent to the allegations of sexual harassment, the respondent appointed one of its employees to conduct an informal inquiry into the complaints. Whilst the chairperson of the inquiry was skeptical about the letters of the complaints laid by Sister Mclean and Major Cohen, nothing turns much on the outcome of the inquiry in as far as the suspension is

concerned. The essence of the chairperson's recommendation was that there was a need for training concerning issues of sexual harassment.

[8] The inquiry was held on the 20th November 2008. It would appear nothing happened in terms of taking any steps in relation to the complaints lodged and the recommendations made by the chairperson of the inquiry until May 2009. On the 5th May 2009 Major Cohen addressed another complaint to the Officer Commanding in which she listed two incidences relating to the allegation that the applicant had brought into the theater and displayed pictures carrying sexual images. Major Cohen further requested that the complaint should be forwarded to the Labour Relations for investigation.

[9] On 14th May 2009, Major Cohen lodged another complaint against the applicant concerning allegations of harassment and intimidation. Thereafter, on the 11th June 2009, the applicant was informed in a letter that disciplinary hearing was to be convened against him concerning:

> ". . . *allegations that you could have made yourself guilty of unacceptable and inappropriate conduct of sexual nature over the period October 2008 to May 2009 and threatening Maj M.A Cohen on 14 May 2009."*

[10]On 28 July 2009, Lt Col Jacobs senior labour relations officer based in Bloemfontein who was appointed to conduct further investigations on the complaints regarding the applicant, addressed what appears to be a preliminary report to the Chief Directorate HR Strategic Direction and Policy (the Chief Director HR). In essence the report indicates that the investigation has commenced and that the charges against the applicant were much more serious than it was made to be in the initial report. In addition the report indicated that:

> *"a. The initial charge of "unacceptable and inappropriate conduct sexual nature" must please be amended to also include. harassment, victimisation and threats to personal life."*

[11] It would appear that on the same day that the report was written an incident occurred whilst Lt Col Jacobs was interviewing people about the matter which prompted him to address a letter dated the same date, 28th July 2009, to Chief Director HR motivating for the suspension of the applicant. The letter reads as follows:

> ***"REQUEST FOR SUSPENSION: 98285463CA DR V. GOVENDER: 2 MILITARY HOSPITAL***..

1. . . .

2. *During the first phase of the investigation a number of serious allegations have been made against Dr Govender. Not only the initial alleged misconduct "of a sexual nature". Further actions lodged against him by fellow medical officers are intimidation, victimisation, and threats to personal life as well as racism.*

3. *Whilst conducting interviews at the Head of Department (HOD) Orthopaedics Dr Govender (the Anaesthetist) was seen lurking at the door, at a time and place where he had no valid reason to be.This type of behaviour has been seen as a form of intimidation.*

4. *In conversation with two specialist from Gaenecology and Obstetrics (Drs van Wyk and Abdurahman) it was indicated that support for the investigation as well as corroboration of witnesses may be forthcoming.*

5. *It is clear from the above that the presence of Dr Govender in the workplace is:*

a. *Hampering the investigation by personal presence in the working environment.*

b. *Intimidating junior personnel to come forward with their statements.*

c. *Creating a hostile environment*

6. *In view of the above it is requested that Dr Govender be suspended from the workplace up to the conclusion of the matter by means of the hearing."*

[12]The applicant was following the above request notified of his suspension in a letter dated 26 August 2009.The relevant parts of the letter read as follows:

"1. . . . .

2. Kindly be advised that it has been decided to suspend you as a precautionary measure, with immediate effect (date of this notification), in terms of the provisions of paragraph 7.2 (2) of Chapter 7 to the Senior Management Services Handbook. The suspension shall be with full pay and will stay in force for a period of 60 days.

3. The reasons for the above-mentioned step are the following:

a. You are suspected of serious misconduct (unacceptable and inappropriate conduct of a sexual nature, intimidation, victimisation, threats to personal life and racism).

b. It is believed that your presence at the workplace may hamper the investigation should you be permitted to remain in your current position.

c. There is a possibility that you may be in a position to intimidate or influence witnesses."

[13]Thereafter, and on 31st August 2009, the applicant's attorneys of record addressed a letter demanding that the suspension of the applicant be uplifted immediately. And more importantly the attorneys indicated that:

"Should we not receive your positive response on or before Wednesday, 2 September 2009 urgent legal action will be taken without any further notice."

[14]The applicant seeks the intervention of this Court on the grounds that the suspension came without warning and as a complete surprise to him. He

contends in his founding affidavit that neither he nor the head of his department was approached prior to the decision to suspend having been taken. He argued in this regard that he was not granted any opportunity to respond to the intended suspension nor was he afforded an opportunity to putting his case or making representations before the decision to suspend could have been taken. The applicant further submitted in this respect that in suspending him in that manner the respondent failed to comply with the requirements of the *audi alteram partem* principle, and for that reason the suspension should be regard as being patently unlawful and procedurally irregular. The applicant further contends that had he been afforded a hearing before the suspension, it would have become obvious that my suspension is most inappropriate in the circumstances and further that envisaged disciplinary action against him is unlawful and in breach of the Protected Disclosures Act 26 of 2000.

Point in limine raised by the respondent

[15]The respondent raised as a point in *limine* regarding the *locus standi* of the Minister, cited by the applicant as the only respondent. In this respect Ms Nymen for the respondent argued that the Minister does not have *locus standi* to be cited as the respondent in these proceedings in that it is the Secretary of Defence, as the employer of the applicant, who

suspended the applicant in terms of section 7(3)(b) read with section 17(1) (b), 16B (1) (b) and (4)(b) (ii) of the Public Service Act, 103 of 1994.

[16]Section 7(1) and (3)(a) - (b) of the Public Service Act deals with the organizational structure of the Public Service indicating that each department shall have a head who shall be the incumbent of the post on the establishment bearing the designation mentioned in column 2 of Schedule 1, 2 or 3 opposite the name of the relevant department or component, or the employee who is acting in that post. In the Department of Defence the organisational structure designate the Secretary for Defence as the head of that department.

[17]Section 17(1)(a) and (b) of the Public Service Act dealing with termination of employment vests the power to dismiss an employee in the executive authority and to be exercised in accordance with the Labour Relations Act 66 of 1995.

[18]Ms Nymen argued that in line with the above legislative frame work and notice of suspension, the applicant ought to have cited the Secretary of Defence, in this proceedings and not the Minister. In my view this argument bears no merit. Institution of proceedings against the various

departments of the State is governed by the State Liability Act No.20 of 1957. In its preamble, that Act provides as follows:

> *"To consolidate the law relating to the liability of the State in respect of acts of its servants."*

[19]Section 1 reads as follows:

> *"**Claims against the State cognizable in any competent court –***
>
> *Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."*

[20]And section 2 reads as follows:

> *"Proceedings to be taken against Minister of department concerned -*
>
> *(1) In any action or other proceedings instituted by virtue of the provisions of section one, the Minister of the department concerned may be cited as nominal defendant or respondent.*

(2) For the purposes of subsection (1), "Minister" shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province."

[21] The issue of the citation of a Minister of a state department received attention in the context of an enforcement of an arbitration award that had been made an order of Court by the Labour Court, in the Labour Appeal Court case of *Minister of Health & Another v Bruckner (2007) 28 ILJ 612 (LAC).* In that judgment where Zondo JP and Comrie AJA concurred with the decision of McCall AJA, the Court held that:

[42] . . . That intention is repeated in s 1 of the State Liability Act. The purpose of s 2 of the State Liability Act, and its predecessor (Crown Liabilities Act 1 of 1910), is to permit a party bringing an action against the state to cite the minister of the department concerned or a member of the executive council of a province as nominal defendant or respondent. This does not mean that an action may only be brought against the state or a province by citing the minister of the department concerned or a member of the executive council for, as pointed out by Nugent JA in Kate on appeal, the government itself can be cited as defendant or respondent.

[43] The purpose of s 3 of the State Liability Act is to provide that where, in actions against the state, a minister (as defined) is cited as the nominal defendant or respondent, and a judgment or order is made against the minister as nominal defendant or respondent, no execution, attachment or like processes may be issued against the minister in his or her personal capacity or against the property of the state.

[44] The State Liability Act is not a bar to bringing an action against a public official or functionary (including a minister), for an order to compel that official or functionary to fulfill an obligation imposed upon him or her by law. Such an action is an action against the public official or functionary concerned and not an action against the stat."

[22] In the light of the above authority, it is my view that the respondent's point *in limine* stands to be dismissed. I now proceed to consider the case of the applicant, which in my view turns around the issue of the speed at which the applicant instituted these proceedings.

[23] In urgent applications the burden to persuade the court to dispense with the forms and service provided for in the Rules of the Court rests with the

applicant. In this respect the applicant has to persuade the court as to why his or her case should be given preference over other cases that are awaiting dates for enrolment. In this regard rule 8(2) of the Rules of the Labour Court requires that an urgent application be supported by an affidavit which inter *alia,* must state:

> *"(a) The reasons for the urgency and why urgent relief is necessary;*
>
> *(b) The reasons why the requirements of the rules were not complied with, if that is the case; and*
>
> *(c) . . . ."*

[24] It is common cause that the applicant was suspended on the 26th August 2009 and only instituted these proceedings on 15th September 2009. It is also common cause that the applicant was informed of the initiation of disciplinary proceedings against him in June 2009. There is no explanation in the applicant's founding affidavit as to why it took the period from the 26th August 2009 to the 15th September 2009 to institute these proceedings. In his founding affidavit the applicant states that:

> *"16. My suspension is procedurally irregular, serves no useful or legitimate purpose and is wholly unjustified in the*

circumstances. I am obviously being severely prejudiced by the suspension and am being precluded from performing my services at the hospital. My suspension clearly can only serve their ulterior purpose of intimidating me and punishing me for having made the protected disclosure in my letter of 22 August 2008. As such, my continued suspension is unlawful and in violation of my fundamental rights, including the right to fair labour practices, human dignity, freedom of expression and occupation.

17. *Given the circumstances set out above, the matter is obviously urgent and it is also in the beat interests of the hospital that this matter be dealt with as one of urgency and without any further delay. It is the most apposite, just and expeditious course in the circumstances to approach the Honourable Court on an urgent basis to protect my rights. I am suffering severe prejudice as a result of my unlawful suspension due to the negative connotation attached to the suspension in general and the affront my good name, reputation and dignity in particular resulting from being precluded from performing my professional duties. The delays inherent in any course of action*

would render the effective protection of my fundamental rights nugatory.

18. I have attempted to resolve this matter by means of corresponding with the Department via my attorneys of record requesting that my suspension be lifted in view of the irregularities involved and the fact that my suspension is completely unnecessary and unjustified. . . .”

[25] In response to paragraph 40 of the answering affidavit of the respondent where the issue of the urgency of the matter is raised, the applicant deals mainly with the prejudice to his rights arising out of the suspension and the disciplinary inquiry. The applicant does not deal with issue of the time it had taken to institute these proceedings.

[26] Mr Potgieter for the applicant argued that in considering the time it has been taken to institute the proceedings, account should be taken into account the objective factors that applied after 2nd September 2009. The submission in this respect is that the applicant was trying to engage the respondent with the view of resolving the problem and that the delay was not so unreasonable to justify refusal to provide the applicant with the relief he is seeking.

[27]In my view the applicant has failed to discharge his duty of showing why his matter deserves a preferential treatment over other matters. As indicated earlier the notice of suspension is dated the 26th August 2009, which the applicant apparently received on the 27th August 2009. It is clear that the applicant's attorneys did nothing after the letter of the 31st September 2009, until the 15th September 2009. There is no merit in the submission that the applicant was still awaiting a response from the respondent in particular regard being had to the fact that the applicant had in his letter of the 31st September placed the respondent on specific terms that failure to comply with the demand, that the suspension be uplifted, will result in an urgent application being instituted without further notice.

[28]The other suggestion by Mr Potgieter that the period for consultation and preparation of the papers should also be factored into the delay, does not assist the case of the applicant in that it does not derive support from the objective facts and circumstances of this case. It is essential that a party seeking an indulgence that he or she takes the Court into his or her confidence by disclosing all relevant facts to assist the Court in exercising its judicial discretion fairly and justly to both parties. The applicant has not in the present instance stated in its papers in what way could consultation and the drafting of the papers have contributed to the

delay in bring the application earlier. Even the submission made from the bar did not take this issue further than that it was important to take into account the period of consultation and the drafting of the papers. The facts as setout in the founding affidavit of the applicant are straight forward, and the notice of motion including the founding affidavit consists of only twelve pages. In the facts setout in the founding affidavit are no different to those set out in the letter dated 31st August 2009. In my view regard being had to the contents of the letter of the 31st August the applicant could quite easily have brought this application much earlier with very little effort in as far as preparation of the papers was concerned. The reading of the letter and the founding affidavit, indicates very clearly that comprehensive consultation had already been done at the time the letter was issued on 31st August 2009.

[29] The same applies to the issue of the issue of the claim for protected disclosure. The applicant knew on the 11th June 2009 about the disciplinary inquiry that would be conducted against him. The charges that would be proffered against were formulated in that letter, and what remained was the date of the hearing. The applicant did nothing about this until 15th September 2009.

[30]In my view, for the above reasons the applicant's application fails because of lack of urgency. I however do not believe based on the authority of *NUM v East Rand Gold And Uranium 1992 (1) SA 700 (A),* that costs should follow the results.

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

1. The applicant's application is struck off the roll.

2. There is no order as to costs.

Molahlehi J

Date of Hearing : 2nd October 2009

Date of Judgment : 8th October 2009

Appearances

For the Applicant : Adv Potgieter SC

Instructed by : Bagraims Attorneys

For the Respondent: Adv R Nyman

Instructed by : The State Attorney