IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J2632/09

In the matter between:

BASANI BALOYI	APPLICANT
AND	
DEPARTMENT OF COMMUNICATIONS	1ST RESPONDENT
MINISTER OF COMMUNICATIONS	2ND RESPONDENT
OFFICE OF THE DIRECTOR GENERAL	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] On the 8th October 2009, the applicant obtained an interim order calling on the respondents to show cause why a final order should not be issued declaring the suspension imposed by the third respondent on 29th September 2009, to be invalid and of no force and effect. The interim order reads as follows:

> *"1. The Rules of the above Honourable Court relating to the forms and manner of service are hereby dispensed with and this matter is dealt with as one of urgency.*

2. *A Rule nisi is hereby and is herewith issued, calling upon the Respondents to show cause on the 19th of November 2009 at 10h00, why a final order should not be granted in the following terms:-*

(i) A declarator should not be issued that the decision of the 3rd Respondent to place the Applicant on suspension in her position as Chief Director Human Resource is invalid, unlawful and of no legal force and effect.

(ii) The Applicant is permitted to resume her duties as the Chief Director of the 1st Respondent.

(iii) The order in paragraph 2 above shall operate as an interim order with immediate effect pending the return day."

[2] The application was opposed by the respondents who in this respect filed an answering affidavit. In the light of this Mr Moshoana, for the applicant submitted in his heads of argument that rather than an interim order, a final determination of the dispute should be made. The respondent's legal representative opposed this approach and indicated that because of the urgency they had not been able to answer fully to the allegations made by the applicant. The matter was then determined on an interim basis and the return date made for the 19th November 2009. However, despite having indicated the need for time to file a comprehensive response to the founding affidavit of the applicant the respondents anticipate the return date on 23rd October 2009. This application was dismissed and costs reserved.

[3] After considering the submission made by the respondents regarding the need to bring finality to the dispute in particular with regard to its impact on the running of the affairs of respondent at the senior management level, the Court indulged and ordered an earlier return date.

[4] The reason for dismissing the anticipation of the return day was essential because the respondents were not only present when the urgent application was heard but had filed an answering affidavit. In fact on the day of the hearing the respondents opposed the suggestion by the applicant's legal representative that because both parties had filed their papers the matter be finalized on that day. The respondents indicated that they needed more time to file a proper and comprehensive response to the applicant's founding papers.

Background facts

[5] The first respondent is the Department of Communications, a government department established in terms of the Constitution of the Republic of South Africa. The second respondent is the Minister of Communications cited herein in his official capacity as such. The third respondent is the Office of Director General, established in terms of the Public Services Act No. 103 of 1994.

[6] The applicant who is the Chief Director: Human Resource Management was suspended on the 29th September 2009. The applicant contended that such suspension was invalid and of no legal force and effect. On the 28th September the third respondent addressed a letter to the applicant which reads as follows:

"Attention: Ms Basani Baloyi

Dear Madam

NOTICE OF INTENTION TO SUSPEND

1. *You are hereby called upon to show cause why you should not be suspended pending a special investigation into the allegations of irregular appointments of staff, favoritism, corrupt and fraudulent activities.*
2. *In your written representation you must specifically show cause why your continued presence at the workplace whilst an investigation is being pursued will not jeopardize the investigation itself and/or interfere with the evidence and/or potential witnesses.*
3. *You are required to furnish me with your written representation by not later than 16h3O today, the 28th September 2009.*

Yours sincerely

MS M MOHLALA

DIRECTOR GENERAL"

[7] Having received the above letter the applicant addressed a letter to the third respondent on the same day and sought to deliver it to her at about 16h30. She was unsuccessful as the third respondent had at that stage already left work. The contents of the said letter reads as follows:

"Dear Ms Mohlala

NOTICE OF INTENTION TO SUSPEND

The above matter as well as your letter dated 28 September 2009 on your intention to suspend me has reference.

1. *In order for me to respond succinctly thereto, I request further particulars in respect of the following:*

   1.1 Which appointments in particular are irregular;

   1.2 Clearly indicate the nature and extent of the alleged corruption, favouritisms and fraudulent activities; and

   1.3 Are these allegations recent OR the ones previously raised and investigated by the Office of the Public Service Commission and the Office of Serious Economic Offences?

2. *Your response to the above mentioned request will enable me to respond to clause 1 and 2 of your letter as soon as practically possible.*

3. *Kindly note that my response to your clause 3 will reach your office upon receipt of my request for further particulars.*

I hope to hear from you soon.

BASANI BALOYI"

[8] According to the applicant she received a telephone call from the assistant of the third respondent the following day advising her that she was required in the third respondent's office at 08h30. On arrival at the third respondent's office the applicant presented the above letter to the third respondent who after reading the letter indicated to her that she must return within 10 (ten) minutes to her office. On her return within the stipulated time, the applicant was served with a letter of suspension, which reads as follows:

"Therefore I take your failure to respond to the contents of the Notice of the Intention to Suspend as an indication of your intention not to respond to the said contents of the letter and as such in the interests of expediting the resolution of this matter, I am not satisfied that your continued presence at the workplace would not jeopardize or hamper the investigation and or interfere with the material evidence and or witnesses. I have accordingly, deemed it necessary to suspend you in order to conduct a proper investigation into the allegations."

[9] After receipt of the above letter and during the course of the day the applicant says that she received a call from the second respondent, the Minister of Communications enquiring about certain appointments. The applicant responded by indicting that she was unable to respond because she was on suspension. According to her the Minister was surprised to hear that she was suspended.

[10] The applicant says in her founding affidavit that the allegations of fraud, corruption, irregular appointments and favouritisms that were leveled against her were those done in 2005. Those allegations were according to her investigated by the Public Service Commission and the Office of Serious Economic Offences. Since that time, almost every year there had been anonymous letters which were sent to the various Ministers who had been responsible for the Department of Communication. The approach adopted by the then Minister was that until the people who made those allegations came to the fore, she would not entertain those kind of allegations.

[11] The applicant attributes the reason for her suspension to the tension that had arisen between her and the third respondent. The tension apparently arose during the process leading to the appointment of the third respondent. The applicant being in charge of the Human Resource Management, was responsible for processing the appointment of the third respondent.

[12] According to the applicant the cabinet approved the appointment of the third respondent on the 26th August 2009 and was following that decision made an offer which to date she still has to accept. However, the third respondent commenced her employment on the 4th September 2009.

[13] Since commencing her employment the first respondent, the third respondent has according to the applicant raised several complaints against her. One of the complaints raised relates to the accusation that the applicant failed to ensure that the third respondent was paid a salary the same as that of the Director General of Home Affairs.

[14] The applicant further states that on 28th September 2009, at or around 09h00, the third respondent came to her office and demanded the keys to the safe, which keeps top secret documents, some not even relating to appointments. She opened the safe and took all the files contained therein. She later proceeded to the other section and demanded the keys to certain cabinets where files are kept. She also ordered a locksmith to change the locks of the cabinets and assigned security guards to monitor all the staff in the Human Resource department.

[15] The case of the applicant is that her suspension was unlawful based on the following grounds: The first ground is based on the contention that at the time of

taking the decision to suspend the applicant the third respondent did not have the power to do so because she had not yet signed the employment contract with the first respondent. However, despite this challenge the respondents have not attached the confirmatory affidavit of the second respondent confirming that the third respondent has indeed signed the contract of employment neither has the third respondent attached a copy of the contract of employment. This contention is raised in the context where the suspension was effected within three weeks of the third respondent assuming her duties with the first respondent.

[16] The second ground concerns the contention that the respondents did not comply with the provisions of the SMS handbook. The two conditions required before suspending an employee are dealt with at Chapter 7 of the SMS handbook. Clause 2.7(2) in the Chapter provides as follows:

> *"(a) The employer may suspend a member on full pay if-*
>
> - *the member is alleged to have committed a serious offence; and*
> - *the employer believes that the presence of the member at the workplace might jeopardize any investigation into the alleged misconduct, or endanger the welling being or safety of any person or state property.*

[17] The third ground is based on the contention that the first respondent's policy governing suspension was not complied with. In this respect the applicant relies on clause 13.5.3 of the Disciplinary Policy and Procedure: Human Resources Management which reads as follows:

"Before an employee is suspended from service . . . , the relevant Manager will, in all instances, first apply the audi alterem partem rule. The employee will furthermore be given at most five working days to respond to the possible suspension . . ."

[18] The applicant contents that in terms of this policy she should have been given a 5 (five) day notice prior to her suspension. There is a dispute about the existence of this policy. The applicant has in my view failed to adduce sufficient evidence to show that this policy has received the necessary approval and was in fact operational.

[19] The fourth ground is based on the contention that the suspension was for the ulterior motive of getting back at the applicant by the third respondent. This ground is as indicated earlier based on the allegation that the third respondent was using the suspension to get back at the applicant for two reasons: The first reason is that the applicant denied her access to the Minister in order to negotiate a salary equivalent to that paid to the Director-General in the Home Affairs Department. The second reason is that the third respondent was unhappy with the applicant requiring her to write the psycho metric test before she could commence her duties. These allegations have been placed in dispute by the third respondent.

[20] The fifth ground, upon which in my view the case of the applicant turns around, concerns the contention that she was not given a proper opportunity to state her case before the suspension.

[21] Mr Van Der Riet for the respondents argued that the applicant has failed to make out a case justifying the grating of the final order. In relation to the application of the *audi alteram partem* rule to cases of suspension, Mr Van Der Riet correctly conceded that the rule applies. In relation to the facts of the present case Mr Van Der Riet contended that the applicant was give the *audi* rule and the rule was properly applied in that the applicant was afforded a proper opportunity to present her case but failed to do so.

The legality of the suspension

[22] In granting the interim order as it did the Court was satisfied that the applicant had shown that she had; (a) a *prima facie* right and no alternative relief. The Court was further satisfied that the matter was one which deserved to be treated as urgent and the balance of convenience favoured granting the urgent interim relief. The requirements for a final order as set out in *NUMSA and Others v Comark Holdings (Pty) Ltd (1997) 18 ILJ 516 (LC)* are - (a) clear right (b) an actual or threatened invasion of that right and (c) absence of any other suitable remedy.

[23] As indicated earlier the issue in this matter turns mainly around the question of whether or not the applicant had the right to be heard *(audi rule)* before the decision to suspend her was taken. There is now authority that the *audi rule* is part of our law and is applicable in cases of suspension of employees. In terms of the *audi rule*, an employee is before suspension entitled amongst others to a fair and reasonable opportunity to make representations as to why he or she should not be suspended. The general principle that the *audi rule* was part of our

law and should be applied was articulated by Zondo AJP, as he then was in *Modise v Steve's Spar Blackheath 20 ILLR 337,* when he said:

> *"[15] The audi rule is part of the rules of natural justice which are deeply entrenched in our law. In essence the audi rule calls for the hearing of the other party's side of the story before a decision can be taken which may prejudicially affect such party's rights or interests or property."*

[24] In *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at 486F*, it was said:

> *" ... what would follow... is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representation a real and not an illusory one."*

[25] The requirement for giving an employee a reasonable time is critical to the realization of the *audi rule* in that not only does it give the employee reasonable time in which to assemble the relevant information but also and more importantly, it entails also affording the employee an opportunity to prepare and be able to challenge the allegations upon which the intended suspension is to be based upon. See *Foulds v Minister of Home Affairs and Others 1996(4) SA 137 (W).* Reasonable or adequate notice also entails the employer providing or disclosing to the employee all relevant adverse allegations or information.

[26] In discussing the principles that informs the *audi rule* the learned author, Baxter: Administrative Law, at page 546-547 Juta 1984, says the following:

> *"In order to enjoy a proper opportunity to be heard, an individual must be properly appraised of the information and reasons which underlies the impending decision to take action against him... the administrative authority should not 'keep anything up its sleeve.".*

[27] The question as to whether or not failure to comply with the *audi rule* renders the suspension unlawful was answered by this Court in the positive in the case of *SA Post office Ltd v Jansen van Vuuren NO and others (2008) 29 ILJ 2974 (LC).* In that case the Court said the following:

> *"There is, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. It is therefore necessary that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words, unless circumstances dictate otherwise, the employer should offer an employee an opportunity to be heard before placing him on suspension."*

[28] Mr Moshoana, is correct when he says by valid and or substantive reasons the Court meant that there must be cogent and recognizable reasons for the suspension. The requirement for valid reasons goes further than the employer simply listing a catalogue of what appears to be serious misconduct without any details of when and where such misconduct occurred. A simply acceptance of the listing of allegations of what purports to be serious allegations by the Court

will result in failure not only to appreciate but also to realize the importance of the fundamental principles informing the *audi rule* which will in turn result in defeating the objectives of economic development and social justice as enunciated in the Labour Relations Act 66 of 1995. In *Semenya and Others v CCMA and others (2006) 27 ILJ 1627(LAC)*, the Court held that the right to be heard must not be easily departed from. It is only in those rare occasions that the Court may sanction non compliance with the right to be heard.

[29] In *Mogothle v Premier of the Northwest Province and others (2009) 30 ILJ 605 (LC)*, Van Niekerk J, in endorsing what was said in *SAPO* supra, had the following to say:

> *"This statement by Molahlehi J is also a response, I believe, to the trend apparent in this court in which employers tend to regard suspension as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worse still, to view suspension as a convenient mechanism to marginalize an employee who has fallen from favour."*

[30] Turning to the facts of the present case, it cannot be said that the applicant was afforded a proper opportunity to make representations about the pending decision to suspend her. In my view the third respondent being aware of the need for a hearing before suspending the applicant, but lacking the basis to do so, used the process as a mere formality. The allegations made against the applicant are very wide, vague and fails to state when the incidence they are based on occurred. This is important taking into account the fact that this matter involves an employee who had been with the first respondent since 2004, on the

one hand and on the other hand the third respondent who at the time of suspending of the applicant had been with the first respond for only few weeks. The other important aspect, which the third respondent ignored relates to the request for clarity by the applicant. This is important regard being had to the fact that allegations of similar nature had previously been made against the applicant prior to the third respondent joining the first respondent. Those allegations were investigated by two independent institutions and nothing seems to have come out of them. In the light of this and as a general principle the applicant was entitled as of right to be given information which should have indicated the basis of the suspension. It is that information, properly presented to the applicant that would have assisted her in formulating and making a meaningful representation in response to those allegations. Without being placed in possession of the details of the alleged misconduct or irregularities the applicant was denied the right to be heard before her suspension.

[31] Aside the issue of the dispute of what time the applicant was notified about the intended suspension, it is apparent that the suspension without doubt was made hastily. There is no evidence as to why the applicant had to make her submission in about five hours.

[32] The manner, in which the suspension was carried out, also leaves much to be desired. In the resent unpublished judgment of *Setlhoane Rebecca Dince and others v M.E.C Education North West Province and others, case numbers: J 2234/09 and J2193/09,* this Court in dealing with the impact that suspension has on an employee had this to say:

"[23] The important principle enunciated in Mhlauli and Muller's cases is that the principle of audi altarem partem rule applies in cases of suspension. It is also important to note that the Court in that case held that the correct approach to adopt in cases of suspension was that enunciated in the Muller's case. I align myself with that approach and wish to emphasize that the prejudice that an employee may suffer in a case of suspension is not limited to financial prejudice in the case where the suspension is without pay. The suspension with pay also has substantial prejudicial consequences relating to both social and personal standing of the suspended employee. In my view any suspension with or without pay has to bring into question the integrity and dignity of the suspended person particularly where the suspension is based on allegations of dishonesty. And quite often suspensions attract media attention and thus the standing of the person before his or her colleagues and the community is bound to be negatively affected.

[33] The Court in *Dince* further quoted with approval what was by the Supreme Court of Appeal in the *Minister of Home Affairs & Others v Watchenuka & another, 2004 (4) SA 326 (SCA) at page 339,* where in emphasizing the connection between the freedom to engage in productive work and the right to human dignity the Court at paragraph 27, held that:

"The freedom to engage in productive work – even where that is not required in order to survive is indeed an important component of human dignity ... for mankind is pre-eminently a social species with an instinct of meaningful association. Self esteem and the sense of self worth the fulfillment of what it is to be a human is most often bound up with being accepted as socially useful."

[34] In the present instance the applicant states in her papers that:

"I may at this point add that even before I got suspended, employees were already aware that I am going to be suspended and other employees were already singing and ululating a day before my suspension. I also wish to add that my suspension was so humiliating that I had to be removed by three security officers from my office and escorted like a criminal. The Director General personally went through my laptop."

[35] Contrary to the contention of the respondents at paragraph 12.2 of their answering affidavit, I find that the applicant never made a representation but in fact what she did was to request details of the allegations before she could make a proper and informed representation. The decision to suspend was thus taken without affording her the opportunity to make a representation.

[36] In my view the *rule nisi* issued by this Court on 8th October 2009, stand to be confirmed. What then remains for determination is the issue of costs. In as far as the costs of the hearing of the application to anticipate the return day, Mr Van der Riet contended that no order as to costs should be made because it was the

Court that in a sense anticipated the return date by changing it from the 19th November 2009 to brought the date to the 23rd October 2009.

[37] In terms of rule 6(12) (c) of the Rules of the Labour Court, a litigant against whom an order was granted in his or her absence in an urgent application may by notice set down the matter for reconsideration of the order. In the present matter as indicated earlier not only were the respondents represented on the day the interim order was granted but they had in fact filed an answering affidavit. The order granted by the Court moving the matter to an earlier date bears no relation to the application to anticipate the interim order. The application was unnecessary firstly because the interim order was made in the presence of the respondents and secondly it was the respondents who requested time to prepare a proper answer to the case of the applicant. In the premises I see no reason in both law and fairness why the respondents should not be ordered to pay costs for the application to anticipate the return day. I also do not see any reason in law and fairness why the respondents should not pay the costs of this application.

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

(i) The rule nisi issued on the 8th October 2009 is confirmed.

(ii) The respondents are ordered to pay the costs of the application to anticipate the return day of the rule nisi and this application the one paying the other to be absolved.

Molahlehi J

Date of Hearing : 23rd October 2009

Date of Judgment : 17th November 2009

Appearances

For the Applicant : Adv Mathibedi

Instructed by : Mohlala & Moshoana Attorneys

For the Respondent: Adv Van der Riet SC

Instructed by : Lebea & Associates