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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2441/10

2010-12-07

In the matter between

THOBEJANE, MAMAGABE HENRY Applicant

and

MOGALAKWENA MUNICIPALITY Respondent

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J U D G M E N T

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STEENKAMP J:

This is an application for a *rule nisi* for the respondents to show cause on the return date why, firstly, a declaratory order must not be issued that the second respondent, one Shella William Kekana, who is the current municipal manager, does not have any legal authority or power to institute
20 any disciplinary proceedings against the applicant; secondly, a declaratory order that the decision of the respondents -- that is the municipal manager and Mogalakwena Local Municipality -- to place the applicant on suspension is invalid, unlawful and of no legal force and affect; thirdly, that the applicant is permitted to resume his duties as manager: corporate support services.

The applicant is Advocate Mamagabe Henry Thobejane. He is the manager: corporate support services of the municipality. He was suspended on 24 November 2010, subsequent to a resolution by the municipality that followed on a report of the municipal manager. The applicant attacks the suspension on the basis, firstly, that the municipal manager did not have the authority to suspend him; and secondly, that the respondents have not complied with clause 14 of his contract of employment. Related to the second argument, is a third argument that the respondents have in any event not complied with the *audi alteram partem* principle.

I will deal with those issues in turn.

In *limine* though, Mr *Vente*r, who appears for the respondents, has raised two issues. Firstly, he points out that the notice of motion that was served on the municipality was signed, not by an attorney, but by Advocate *Maunatlala* who appears for the applicant in this hearing. The court file, though, contains a notice of motion that is headed "amended notice of motion", that is indeed signed by an attorney, Mr R K Mashego. It appears that the municipality's attorneys drew the applicant's attorney's attention to the fact that the notice of motion appeared to be irregular and that the applicant's attorneys attempted to rectify that irregularity by filing an amended notice of motion. The applicant's attorney and counsel contend that the amended notice of motion signed by the attorney was sent to the respondents, although Mr Venter has no record of that having being done.

I will, for the sake of expedience and having heard full argument in this matter, except that this may have been a *bona fide* oversight on the part of the applicant's attorneys that has not led to any prejudice for the respondent. I will therefore proceed and have proceeded to hear the matter despite that objection by Mr Venter.

The second issue is a jurisdictional question and that is that it appears, at least from the founding affidavit, that the applicant has relied on an unfair labour practice as set out in Section 186(2)(b) of the Labour Relations Act (Act 66 of 1995) in which to found his claim.

In reply, the applicant's counsel has explained that that is not his client's sole cause of action. With reference to the notice of motion where I am asked to declare that the decision to suspend the applicant is "invalid, unlawful and of no legal force and effect", he points out that the claim is not founded solely on section 186(2)(b).

I will, once again, accept that I have jurisdiction to deal with the matter and I will address the question of an unfair labour practice again when dealing with the requirements for an interim interdict.

Turning then to the merits:

Firstly, I consider the allegation that the municipal manager did not have the authority to either suspend or institute any disciplinary proceedings against the applicant. That argument is based on a further argument that the municipal manager was not validly appointed in terms

of the Municipal Systems Act (Act 32 of 2000). However, that appointment was made as far back as July 2009. It has not been challenged, not before me or in other proceedings before this court or in any other court. The decision to appoint a municipal manager therefore stands. It has not been set aside and I must accept, until another court may come to a different conclusion, if challenged, that the appointment was validly made.

The relief sought under prayer 2.1 is dismissed.

I turn then to the question of compliance with the *audi alteram partem* and compliance with clause 14 of the contract of employment. It would be convenient to quote that clause in full.

Under the heading, "precautionary suspension", clause 14.1 reads as follows:

> "The employer may suspend the employee on full pay if he is alleged to have committed a serious offence and the employer believes his presence at the workplace might jeopardise any investigation into the alleged misconduct or endanger the wellbeing or safety of any person or municipal property; provided that, before an employee is suspended as a precautionary measure, he must be given an opportunity to make representation on why he should not be suspended".

Clause 14.2 goes on to say:

"The employee who is to be suspended must be notified in writing of the reasons for his suspension simultaneously or at the latest within 24 hours after the suspension. He shall have the right to respond within seven working days".

As an aside, I should also note that as is prescribed for the employees of local government, if the employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within 60 days.

It is common cause that the employee in this case was given only two hours to respond to a notice notifying him of the intention to suspend him. He did respond and in his response he quoted both clause 14.1 and clause 14.2 in full. He then said in his letter in reply:

"I believe that a suspension must not be used for ulterior motives or to punish an employee. If suspension is preferred, I request that I be given seven working days to respond to the allegations as provided for in my employment contract".

I have debated the interpretation of clause 14 with the applicant's counsel. It appears to me quite clear that the clause does envisage a bifurcated procedure, namely, in terms of clause 14.1, that the employee

must be given "an opportunity to make representation" *before* he is suspended; and then, in terms of clause 14.2, once he is or has been suspended, he has the right "to respond within seven working days", in other words, within seven working days after the suspension has taken effect.

It is common cause that the employee in this case, who is an admitted advocate of the High Court, did not take the opportunity to make use of the process outlining clause 14.2. His complaint is that the opportunity to make representations in clause 14.1 was not sufficient in that space of two hours.

In this regard, I take into account what His Lordship, Mr Justice Van Niekerk had to say in *Mogothle v Premier of the North West Province* 2009 (4) BLLR 331 (LC) at paragraph [37]. Referring back to previous decisions of this court, confirming the right to be heard prior to suspension, he said the following:

> "I do not think that what the court intended by this statement, was that a hearing prior to a suspension should be modelled on what has been termed the 'criminal justice model' with all of the hallmarks of a criminal trial. This court has held previously that the Code of Good Practice: Dismissal in Schedule 8 to the LRA envisages a less formal process, one in which the employer and employee engage in what the ILO's committee of experts has termed in the context of

> pre-dismissal procedures, a process of dialogue and reflection between the parties. I see no reason why the same conception of procedural fairness should not apply prior to a proposed suspension pending an investigation into alleged misconduct".

Having regard to that *dictum* and to the Code of Good Practice, it appears to me that the informal process followed before suspension in this case, albeit that it could be criticised for having been of a fairly short duration, is no way illegal, unlawful or invalid.

The employee had a further opportunity to make full representations as envisaged in clause 14.2 of his contract of employment. He was alive to that process, as is clear from the letter that he addressed to the employer on 24 November 2010. He signs the letter as Advocate M H Thobejane and I must accept that he is versed in legal process. There is no indication on the affidavits before me why he did not take the opportunity to make use of that further vehicle to make representations.

That then deals with the question of clause 14 of the contract of employment and in terms of that process, I am also satisfied that the employer has complied with the *audi alteram partem* principle as embodied in the contract of employment itself.

The application for the relief sought in paragraphs 2.2 and 2.3 must therefore also fail.

The applicant's counsel did raise one further problem with regard to the suspension and that is that it was not based on serious misconduct and that there was no reason for the suspension. I am loath to express an opinion without having heard evidence on the merits of the matter as to what "serious misconduct" in this context entails. The municipality has alleged that it suffered financial loss as a result of the applicant's conduct.

In terms of the well-known rule in *Plascon Evans Paints Ltd v Van Riebeecck Paints (Pty) Ltd* 1984 (3) SA 623 (A), I have to accept that that is so. I am not sitting here as a chairperson of disciplinary hearing. That hearing has to be held within 60 days and it is for the chairperson of that hearing to decide whether there was any misconduct and if so, whether the misconduct was serious.

On the papers before me, I am satisfied that the alleged misconduct is serious enough to justify suspension in circumstances where it is alleged that the applicant will have the opportunity to interfere with documentary evidence and witnesses.

Although the applicant is suffering harm, that harm is not irreparable. The disciplinary hearing must take place within 60 days and he will have the opportunity to clear his name. He also has an alternative remedy with regard to the alleged unfair labour practice complained of. In terms of section 186(2)(b) of the LRA that conduct, namely, an unfair suspension, must be referred to the South African Local Government Bargaining Council for resolution.

To conclude then, the applicant has not established a *prima facie* right and has not discharged the onus of proving the other elements of an interim interdict.

Although both parties have asked for costs to be awarded to the successful party, I bear in mind that the applicant is still a senior employee of the municipality. If the disciplinary enquiry does not find that he has committed misconduct, he will resume his duties within the next two months. He will have to forge a new relationship or a renewed relationship with both municipality and the municipal manager, Mr Kekana. In those circumstances I am of the view that an adverse costs order would have a chilling affect on that relationship.

I therefore make the following order:

The application is dismissed. There is no order as to costs.

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**STEENKAMP J**

**7 December 2010**

For the applicant: Adv MI Maunatla

Instructed by: Mashego attorneys

For the respondents: Adv R Venter

Instructed by: Mohale Inc.