



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

C922/2014

In the matter between:

NOZUKO PATIENCE MDAKA

Applicant

And

NAMA KHOI MUNICIPALITY

First Respondent

JANNIE T LOUBSER

Second Respondent

JACOBUS VAN WYK

Third Respondent

Date heard: 17 February 2015

Delivered: 20 February 2015

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks an order on an urgent basis in the following terms that:

“The suspension of the Applicant by the First Respondent on 12 June 2014 (date of first Respondent’s Resolution) be and is hereby declared unlawful;

The Applicant’s suspension is set aside and Respondents are ordered to reinstate her.

The indefinite “Compulsory Special Leave” which the Respondents have imposed on the Applicant is regarded as an extension of the earlier “suspension” and is declared unlawful and is set aside.”

- [2] The applicant the Chief Financial Officer of the First Respondent, filed founding papers in this application on the 17 October 2014. She was placed on precautionary suspension, pending the institution of disciplinary proceedings, with full pay, on the 13 June 2014 in terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010 (the regulations) following on a Council resolution of the first respondent. She avers in her founding papers that at the time she signed the founding papers the suspension “is well in excess of 3 months, and accordingly in non-compliance with the regulations in particular regulation 6(6)(a)”. The validity of her suspension she submits, ended on 11 September 2014.
- [3] Regulation 6(6) reads as follows:-
- “(6)(a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.
- (b) the period of three months referred to in paragraph (a) may not be extended by the council.”
- [4] On the 12 September 2014, the first respondent wrote to her placing her on “compulsory special leave from 13 September until further notice from the municipality, pending finalization of the disciplinary action”. She submits that this “compulsory special leave” is nothing but the extension of her suspension. I note that by the time this matter was heard in court, the first respondent had further, on the 6 February 2014, uplifted the so-called “compulsory special leave” and purportedly put the applicant on precautionary suspension for a second time. Applicant did not seek to amend her notice of motion to take account of these developments. It was submitted on her behalf that for all intents and purposes she remained unlawfully suspended given the applicable regulations, from the time that three months had elapsed since her first suspension. A date has now been set for the disciplinary enquiry of the

applicant, which was confirmed from the bar to be in two weeks from the date of this hearing.

Urgency

[5] The grounds for urgency are set out in paragraph 38 of the founding affidavit as follows:

“38.1 The matter is clearly urgent. My mandatory 3 months suspension has expired, but continues unlawfully, and is one that has lapsed by reason of me not being charged within that 3 month period.

38.2 The Council is not empowered to extend my suspension, in these circumstances. (see Regulation 6 (6)(b), supra.

38.3 I wrote to the Municipality per Annexure “F”, and awaited their advice as to their Investigations and the Charge Sheet against me, but they have as yet not responded.

38.4 My attorneys are in Durban and I needed to consult with them.

38.5 I had a death in my family in the interim period, and this contributed to much delay, for which I am apologetic. This was beyond my control and unanticipated.

38.6 My very close aunt Mrs Nozizwe Agnes Khani who was more of a mother to me died on 30 September 2014 and the funeral services which took place in the distant Colesburg and De Aar still continues.

38.7 I needed to collect sufficient funds to place my attorneys in fees, for the purposes of this Application. Unlike the Respondents, I am not a person of means.”

[6] Essentially, on her own version applicant’s suspension was invalid as of the 12 September 2014. Her affidavit is signed the 15 October 2014. It is filed on the 17 October 2014. She provides no details as to when or where she consulted with her attorneys. In addition, the court file contains a letter dated 11 December 2014 from her attorney’s correspondent in Cape Town stating that the file had been indexed and paginated and requesting an allocation for

a set down date. The Labour Court has a judge on urgent duty throughout the year, including any recess period. It is evident that no attempt was made to ensure this matter be set down to be heard on an urgent basis as from 15 October 2014.

- [7] Taking into account the above, this application simply cannot be considered to be urgent. Even had a request been made to set the application down with the necessary urgency after the founding papers had been filed, the delay of over one month between the end of the three month period of applicant's suspension and the signing of the founding affidavit has not been sufficiently explained. The words of Van Niekerk AJ (as he then was) in **National Police Services Union & others v National Negotiating Forum & others**¹ are apposite:

[39] The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits, or any time-limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court."

- [8] My finding that this matter is not urgent should in no way be read as a vindication of the first respondent's failure to meet its statutory obligations. However, the impact of such failure on the applicant's rights, if any, may fall to be determined in another forum.

- [9] In all the above circumstances, I make the following order:

¹ (1999) 20 ILJ 1081 (LC)

Order

1. The application is struck off the roll.
2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Adv. Instructed by Messrs Dehal Attorneys

Respondent: Adv. C. Bosch instructed by Wessels and Smith Attorneys