



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case No: C714/2016

REPORTABLE

In the matter between:

HENDRIK BARNARD

Applicant

and

KANNALAND MUNICIPALITY

First Respondent

MAGDELENA BARRY

Second Respondent

PHILLIP ANTONIE

Third Respondent

ALETTA THERON

Fourth Respondent

JOSLIN JOHNSON

Fifth Respondent

JEFFREY DONSON

Sixth Respondent

HYRIN RUITERS

Seventh Respondent

WERNER MASHOA

Eighth Respondent

R STEVENS

Ninth Respondent

Heard: 11 November 2016

Delivered: 23 November 2016

JUDGMENT

GOLDEN, AJ

Introduction

- [1] The applicant launched an urgent application on 25 October 2016 challenging his suspension from employment as the Director: Corporate Services of the Kannaland Municipality (“the Municipality”), the first respondent in the application. The applicant seeks an order for his suspension to be set aside on the basis that it is unlawful. The lawfulness of the applicant’s suspension arises from an interpretation of the Local Government: Disciplinary Regulations for Senior Managers 2010 (“the Regulations”).
- [2] The question to be decided is whether the applicant’s suspension should be set aside on the basis that the Municipality failed to comply with the relevant provisions of the Regulations.

Background Facts

- [3] It is not necessary to recite all the facts. I will accordingly only refer to the most salient facts to which the legal issues relate.
- [4] The first respondent's Municipal Council convened a special meeting on 16 September 2016 wherein a decision was taken, in principle, to suspend the applicant as a precautionary measure based on the allegations of misconduct received against him regarding the distribution of a private and confidential report addressed to the Executive Mayor.
- [5] The allegation of misconduct and the intention to suspend the applicant was conveyed to him in writing on 19 September 2016. He was given seven days within which to submit written representations to the Municipal Council as to why he should not be suspended pending the outcome of the investigation into the allegations of misconduct against him.
- [6] On 20 September 2016 the applicant's attorney wrote to the Municipality seeking clarity into the alleged misconduct referred to in the letter. The Municipality replied on 21 September 2016 with further information. The applicant then submitted his written representations on 26 September 2016 as to why he should not be suspended.
- [7] The applicant's written representations were included in the agenda for the Municipal Council meeting on 11 October 2016. This meeting decided that the meeting should be postponed in order to properly consider the issue of the applicant's suspension at a special meeting to be convened within seven days.

[8] A subsequent special meeting was then convened for 17 October 2016 to consider the applicant's representations. At this meeting the Municipal Council resolved to suspend the applicant. The decision was recorded as follows:

- "1. Dat Mnr. Hendrik Barnard met onmiddellike effek geskors word;*
- 2. Dat die Munisipale Bestuurder vandag nog die Raadbesluit aan Mnr. Barnard kommunikeer;*
- 3. Dat die Uitvoerende Burgemeester teenwoordig is wanneer die Waarnemende Munisipale Bestuurder die besluit aan Mnr. Barnard kommunikeer."*

[9] Following the decision of the Municipal Council, the applicant then received a letter on 17 October 2016 informing him of the decision to suspend him.

The basis of the applicant's challenge

[10] Mr Metembo, who appeared for the applicant, argued that the legal basis for the challenge of the applicant's suspension was twofold: first, the applicant challenges the legality of the meeting that was convened on 17 October 2016 where the decision to suspend the applicant was taken, and second, that the suspension was unlawful in that the Municipality did not comply with Regulations 5 and 6, which regulates the procedure to be followed for the suspension of a senior manager.

[11] The applicant, however, does not challenge the legality of the meeting convened on 17 October 2016 in his founding affidavit. His case is based on the non-compliance with Regulations 5 and 6 that relate to the suspension of a senior manager. The challenge to the legality of the meeting and all decisions taken as a consequence of this meeting

appears for the first time in the replying affidavit. It is trite that an applicant's case must be made out in the founding papers.¹ There would, needless to state, be prejudice to the Municipality if this court were to deviate from this long established legal principle. I shall accordingly confine myself to the basis of the challenge as contained in the founding papers as it would be inappropriate for the applicant to expand the basis for his challenge in reply or in legal argument. Counsel for the applicant in any event abandoned his reliance on this ground in the course of his argument.

The legal framework: the Regulations

[12] The applicant contends that his suspension is unlawful for non-compliance with the Regulations 5 and 6.

[13] The procedure for a precautionary suspension is dealt with in Regulation 6, which reads as follows:

"6. Precautionary suspension –

(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that –

(a) the presence of the senior manager at the work place may –

(i) jeopardise any investigation into the alleged misconduct;

(ii) endanger the wellbeing or safety of any person or municipal property; or

(iii) be detrimental to stability in the Municipality; or

(b) the senior manager may –

¹ Tittys Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & Others 1974 (4) SA 362 (T) at 369A-B

- (i) *interfere with potential witnesses; or*
 - (ii) *commit further acts of misconduct.*
- (2) *Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipality council why he or she should not be suspended, within seven (7) days of being notified of the council's decision to suspend him or her.*
- (3) *The municipal council must consider any representation submitted to it by the senior manager within seven days.*
- (4) *After having considered the matters set out in sub-regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.*
- (5) *The municipal council must inform –*
- (a) *the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and*
 - (b) *the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven (7) after such suspension.*
- (6) (a) *If the 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 council."*

[14] Section 186(2)(b) of the Labour Relations Act 66 of 1995 (“LRA”) contemplates both a precautionary and punitive suspension. The applicant’s suspension was clearly a precautionary suspension contemplated in Regulation 6.

[15] It is trite that a lawful suspension must be substantively and procedurally fair.²

[16] In Mogothle v Premier of the North West Province & another³ the Labour Court identified three criteria for a valid suspension:

- (a) The employer must have a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct;
- (b) There is some objectively justifiable reason to deny the employee access to the workplace;
- (c) The employee must be heard before a decision to suspend him/her is taken.⁴

[17] The first two criteria involve an enquiry into the substantive fairness of the suspension, and the third, involves procedural fairness.

[18] Because the applicant is challenging the lawfulness of his suspension in terms of Regulation 6, it follows that non-compliance with this Regulation in effecting the suspension of the applicant would result in the applicant’s suspension being unlawful. A demonstration of this unlawfulness would be the basis of the applicant’s right to the relief he seeks.

² HOSPERSA & Another v MEC for Health, Gauteng Provincial Government [2008] 9 BLLR 861 (LC); SAPO Ltd v Jansen van Vuuren N.O. & Others [2008] 8 BLLR 798 (LC)

³ [2009] 4 BLLR 331 (LC)

⁴ At para [39]

[19] This Court has pronounced on the interpretation and application of Regulation 6 in recent judgments.

[20] In Lebu v Maquassi Hills Local Municipality & others (2)⁵, van Niekerk J stated the following:

“The procedure relevant to the suspension of a senior manager in terms of regulation 6 can be summarised as follows:

(a) A municipality is entitled to suspend a senior manager on full pay, if it reasonably believes that a senior manager has committed an act of serious misconduct.

(b) The municipality must have reason to believe that the continued presence of the senior manager at the workplace will either jeopardize any investigation into the alleged misconduct, or endanger the well being or safety of any person or municipal property. It will also be sufficient that the municipality believes that the manager’s continued presence in the workplace will be detrimental to stability in the municipality, or that the manager may interfere with potential witnesses, or commit further acts of misconduct. The purpose of any suspension must be rational, and a municipality must be in a position to establish the reasonableness of its belief.

(c) A municipality may do no more than take a decision in principle, before affording the affected senior manager at least seven days’ notice of its intention to suspend him or her. The notice must contain at least a

⁵ (2012) 33 ILJ 653 (LC)

*description of the misconduct that the manager is alleged to have committed, and the Council's justification for its in-principle decision, and invite representations in relation to both. Both the nature of the misconduct alleged and the purpose of the proposed suspension must be set out in terms that are sufficiently particular so as to enable the senior manager to make meaningful representations in response to the proposed suspension.*⁶

[21] In Mere v Tswaing Local Municipality & Another,⁷ referring to Mojaki v Ngaka Modira Molema District Municipality & Others,⁸ the court confirmed that:

*"The object of regulation 6 of the regulations is to afford an employee a hearing before the decision to suspend him or her is taken. That object is achieved by calling on the employee to show cause why he or she should not be suspended pending an investigation or disciplinary hearing."*⁹

[22] The Court in Mere went on to state that Regulation 6 contemplates the opportunity to make representations before the final decision is taken to suspend a senior manager and that the manager must at least be placed in a position where he or she is able to make such representations.¹⁰

[23] In Tsietsi v City of Matlosana Local Municipality & Another¹¹ the Labour Court held the following in relation to Regulation 6:

⁶ At para 16

⁷ [2015] 36 ILJ 3094 (LC)

⁸ [2015] 56 ILJ 1331 (LC) at para [29]

⁹ At para [36]

¹⁰ Mere *ibid* at paragraph [37]

¹¹ [2015] 36 ILJ 2158 (LC)

“In my judgment, the above authorities on which the applicant relies, should not be understood to amount to the following two propositions:

12.1 *that the particularity of the allegations of misconduct must be of such detail as to allow for the setting out of the defence in response thereto in the applicable representations in terms of regulation 6. Or as applicant averred to: ‘show that the allegations have no prospects’. This is because the suspension in terms of the regulation is precautionary, and resorted to in order for an investigation to take place as to whether charges should follow, and not a disciplinary sanction in its own terms;*

12.2 *that the municipality must set forth evidence to show that the person involved may interfere in the conduct of the investigation against him – or herself. Reference to the position of the senior official and the attendant powers and responsibilities that he or she has, read with the allegations of misconduct as set out in the pre-suspension letter, should suffice.”¹²*

[24] The Municipality must accordingly have complied with Regulation 6, and the criteria identified in Mogothle when it decided ultimately to suspend the applicant.

[25] The Municipality must have notified the applicant of its intention to suspend him and must have provided basic particulars as to what motivated the Municipality’s intention to suspend him in order to provide him with an opportunity to submit representations why he should not to be suspended. The opportunity to submit representations must

¹² Ibid para [12]

have been conveyed to the applicant within seven days of being notified of the Municipal Council's decision to suspend him. The Municipal Council must then consider any representations submitted by the applicant within seven days. In terms of Regulation 6(4), and after having considered the factors in Regulation 6(1)(a) and (b), together with the applicant's representations, it may then suspend the applicant.

[26] The Municipality resolved that:

- (a) the matter was highly sensitive;
- (b) there was a real fear that because of his seniority, the applicant might victimise his subordinates;
- (c) He had already disclosed confidential information to third parties without the consent of and to the detriment of the Municipality and he may do so again;
- (d) There was a need to protect potential witnesses against any undue influence by the applicant.

[27] It is not in dispute that the applicant was afforded a hearing within the required time period stipulated in the Regulations and that he was afforded an opportunity to submit representations why he should not be suspended.

[28] Having regard to the aforementioned factors and the applicant's representations, the Municipality then suspended the applicant.

- [29] The applicant alleges that the Municipality considered his representations on 11 October 2016, fifteen calendar days after he first submitted his representations on 26 September 2016.
- [30] He alleges, in the alternative, that his representations were not considered by the Municipal Council at all, and that only a vote took place on 17 October 2016. He relies on a voice recording of the Municipal Council meeting of 17 October 2016, wherein the decision to suspend him was taken. Neither of the parties placed a copy of the transcript of this meeting before the Court. It is however not in dispute that the Council voted on the decision whether to suspend the applicant.
- [31] The applicant admitted in his representations that he had disseminated the report in question to his colleagues but that he had not known that the report was confidential. This, the Municipality contends, together with its reasons why the applicant should not be granted to the workplace, was the basis for his suspension.
- [32] The applicant knew why the Municipality intended to suspend him. The reasons for the suspension were contained in the notice given to him. He was afforded an opportunity in terms of the Regulations to submit representations why he should not be suspended.
- [33] The Municipality considered his representations on 11 October 2016 when they first met as a Council. The meeting was then postponed to 17 October 2016 for further consideration, and for a decision. There is no basis for the applicant's contention that the Municipal Council did not consider his representations before a decision was taken to suspend him. On the contrary, the meeting of 11 October 2016 was postponed to 17

October 2016 to afford members of the Council a further opportunity to consider his representations, given the seriousness of the matter.

- [34] Regulation 6(3) stipulates that the Municipal Council must *consider* any representations submitted to it by the senior manager within seven days. The regulations however do not state that the *decision* to suspend must be made within seven days. It may be that the sub-regulation contemplated that a decision was to be made within seven days. I am however not prepared to adopt this interpretation or to infer what this sub-regulation intended given the nature of the challenge. There is also nothing in the Regulations which prohibits a further consideration of the representations.
- [35] The applicant also challenges the legality of his suspension on the ground that the Municipality did not institute an investigation as contemplated in the regulations. The Municipality's obligations in respect of an investigation are regulated in somewhat contradictory terms.
- [36] Regulation 5(3) stipulates that if a Municipal Council is satisfied that there is reasonable cause to believe that an act of misconduct has been committed by the senior manager, the Municipal Council must within seven days appoint an independent investigator to investigate the allegations of misconduct. Regulation 6(1) stipulates that a senior manager may be suspended where *inter alia* the presence of the senior manager at the workplace may jeopardise any investigation into the alleged misconduct. The logical interpretation is that Regulation 6(1), which deals with the process of suspension, is intended to be a separate process than the one contemplated in Regulation 5. There is accordingly no merit in the challenge that the applicant's suspension was unlawful because of the Municipality's failure to institute an investigation in accordance with Regulation 5.

[37] The final aspect of the application relates to the involvement of the Mayor and Speaker of the Municipal Council, the second and fourth respondents respectively. The applicant alleges that they should not have considered his representations in that he had filed grievances against them. The timing of the grievances requires further scrutiny. The subject of his grievances in respect of the Mayor and the Speaker appeared in the media on 7 September 2016. The grievances were filed on 21 September 2016, two days *after* the applicant received a notice informing him of the Municipality's intention to suspend him. Why the applicant waited until 21 September 2016, two weeks after it first appeared in the media, is not explained. It seems to me that there is at least the likelihood that the applicant had filed the grievances in retaliation to his suspension. In my view the grievances did not automatically disqualify the Speaker and Mayor from considering the applicant's representations and from participating in a meeting where a decision was made to suspend him. There are also no facts before me to suggest that the remaining Council members who considered the applicant's representations, and who voted in favour of his suspension, did not do so objectively and impartially. I remain mindful that the applicant does not challenge the legality of the Municipal Council meeting of 17 October 2016 in my determination of this issue.

[38] The applicant also contends that no reasons for his suspension were given, which makes his suspension unlawful. It is common cause that the applicant was given reasons for his suspension, albeit that it was not in the letter dated 17 October 2016 wherein he was informed of his suspension. Counsel for both parties confirmed that the applicant was provided with the recording of the meeting of 17 October 2016 which contained the reasons for his suspension. However, the applicant was fully notified of

the reasons for his suspension when he was first notified of the Municipality's intention to suspend him.

[39] The applicant also challenges the fairness of his suspension, although Mr Metembo was reluctant to admit this in legal argument. A challenge as to the fairness of the applicant's suspension is readily apparent from the founding affidavit where he directly alleges that the Municipality has not established a factual basis for the reasons to suspend him. Mr Metembo also argued that he was not treated fairly when the decision to suspend him was taken. The applicant submits that, for this reason, his suspension too was unlawful.

[40] The fairness of the applicant's suspension is not a matter for this Court to decide. In Member of the Executive Council for Education North-West Provincial Government v Gradwell,¹³ the Labour Appeal Court reminds us that disputes about unfair labour practices must be referred to the CCMA or Bargaining Council. The LAC also held that the declaratory order that a suspension is unfair will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction,¹⁴ and that a final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually better be accomplished in arbitration proceedings, except perhaps in extraordinary or compelling urgent circumstances.

[41] The LAC further held that where the suspension carries with it a reasonable apprehension of irreparable harm, then more often than not, the appropriate remedy for

¹³ [2012] 33 ILJ 2033 (LAC)

¹⁴ See also *Mantzanis v University of Durban Westville & Others* (2000) 212 ILJ 1818 (LC).

an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings. In the instant case, the applicant does not seek such an interim order. Based on the authority in Gradwell which I am obliged to follow, this Court does not have the legal competence to determine the fairness of the applicant's suspension.

[42] Notwithstanding that Regulation 6 was not strictly followed, substantial compliance, in my view, suffices to demonstrate compliance. Notably, there was compliance with the *audi alterem partem* rule where the applicant was afforded an opportunity to be heard and where his representations were considered before the Municipal Council resolved to suspend him.

[43] The LAC in Gradwell held that an opportunity to make written representations showing cause why a precautionary suspension should not be implemented, will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness.¹⁵

[44] Having considered all the relevant factors and the legal principles, I am of the view that there was substantial compliance with Regulation 6 and that, for this reason, the applicant's suspension was lawful.

Conclusion

[45] The applicant has failed to demonstrate that he was unlawfully suspended, and has failed to demonstrate exceptional circumstances to justify intervention in his suspension by this Court.

¹⁵ *Gradwell ibid* at para [44] page 2052.

[46] His suspension is of a limited duration, and the Municipality is obliged in terms of Regulation 6(a) to commence the disciplinary hearing against the applicant within three months, failing which the suspension will automatically lapse.

Order

[47] I accordingly make the following order.

- (1) The application is dismissed.
- (2) There is no order as to costs.

GOLDEN, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant's attorneys: Duvenhage Keyser & Jonck Inc

First Respondent's attorneys: Blyth & Coetsee Attorneys