



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 862/12

In the matter between:

MSINDISI NTULI

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

NATIONAL COMMISSIONER, SAPS

Second Respondent

PROVINCIAL COMMISSIONER, SAPS

Third Respondent

MINISTER OF SAFETY & SECURITY

Fourth Respondent

PROVINCIAL HEAD OF CRIME

Fifth Respondent

INTELLIGENCE, SAPS

Heard: 27 September 2012

Delivered: 9 October 2012

Summary: Urgent application – suspension of SAPS member – SAPS regulation 13 – member given opportunity to make representations – no *prima facie* right to uplift suspension – application dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

- 1] The applicant, a constable in the South African Police Service (SAPS), was suspended without pay on 12 September 2012. He has brought an urgent application during the court recess in the form of a rule *nisi*, asking for the suspension to be uplifted and for his salary to be reinstated.
- 2] The respondents have been given two court days' notice of the application. They have not had an opportunity to file answering papers, but Mr *Titus*, who appeared for the respondents, was willing to argue the application on the applicant's papers.
- 3] Having heard the parties' argument, I dismissed the application with costs on 27 September 2012. These are the full reasons for my judgment.

Background facts

- 4] The applicant is employed by the SAPS in its Crime Intelligence division. He was arrested on 26 April 2012. It appears from a "notice of rights in terms of the Constitution" issued on that date that he was detained pursuant to allegations of corruption and defeating the ends of justice. The applicant's legal representative submitted that those charges against him were subsequently withdrawn; however, in his founding affidavit, the applicant says that a charge of theft was subsequently withdrawn.
- 5] On 8 August 2012, the Provincial Commissioner of the SAPS (the third respondent) presented the applicant with a "notice of intended suspension or temporary transfer in terms of regulation 13 of the South African Police Service discipline regulations, 2006" dated 30 July 2012. The notice was addressed to the applicant and read as follows:

"1. You are hereby notified that your suspension or temporary transfer under regulation 13 of the Discipline Regulations for the South African Police Service, 2006, promulgated in terms of the South African Police Service Act, 1995 will be considered on the grounds that you are alleged to

have committed serious misconduct –

1.1.1 by contravening Regulation 20 (Z) of the Discipline Regulations, 2006, in that, on 2012-04-26 you were arrested for corruption and or defeating the ends of justice whereby you did not hand in exhibits (100 litre blue drum containing a large quantity of cannabis) into the SAP 13 at SAPS Wartburg.

2. You are entitled to submit written representations regarding the possible suspension or temporary transfer.

3. Anything you wish to bring to the attention of the Commissioner who will consider the suspension or temporary transfer must be delivered to or communicated to Provincial Behaviour Management: seventh floor, Servamus building, room 718, Durban no later than five days from you signing this notice. If no representations have been received by then, it will be accepted that you do not wish to say anything and you're possible suspension or temporary transfer will be decided on without further notice."

- 6] According to his attorney, the applicant did make representations in the form of an unsigned document under the heading "affidavit" and the further heading: "Employee representation on allegation levelled against him". However, that document deals with allegations of assault and theft and does not deal with his suspension at all. Nevertheless, it is common cause that the applicant was given the opportunity to make representations.
- 7] On 5 September 2012 the applicant was transferred from the Crime Intelligence provincial head office to the Brighton Beach cluster. He stated in his affidavit, and his attorney submitted in argument, that he assumed that the transfer was as a result of his representations. However, there is nothing in the correspondence and other documents emanating from SAPS to suggest that the transfer was related to the notice of 30 July 2012 (received by the applicant on 8 August 2012) or his representations.
- 8] On 17 September 2012, the applicant received a "notice of suspension in terms of regulation 13" from the Provincial Commissioner. That notice read:

"You are hereby informed that you are deemed to be suspended as from

2012-09-12 without salary or any allowances, due to the fact that you are alleged to have committed serious misconduct in that, on 2012-04-26 you were arrested for corruption and or defeating the ends of justice whereby you did not hand in exhibits (100 litre blue drum containing a large quantity of cannabis) into the SAP 13 at SAPS Wartburg.

Your representation was received from yourself [*sic*] for consideration before the decision to suspend has been made.”

9] The applicant argues that his suspension was unfair for the following reasons:¹

- a) “I have not been found guilty of any misconduct and the termination of my salary is unfair.
- b) The statements and affidavits attached to the report to the employer representative are fabricated and contradictory could not sustain prove the charges or allegations, beside when I was arrested the allegations were corruption and defeating ends of justice and not as now framed on annexure MN 11.
- c) I have a family that I support, and they will suffer prejudice if the suspension and termination of my salary were to stand.”

Evaluation / Analysis

10] In order to decide whether the application should be granted, the court has to consider the well-known principles relating to interim interdicts set out in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* ² and subsequent judgments.

11] Before considering those factors, I shall briefly consider the aspect of urgency.

¹ Spelling and grammar as in founding affidavit.

² 1969 (2) SA 256 (A) 267 A-F.

Urgency

- 12] I am satisfied that the application is urgent. The applicant received the notice of suspension on 17 September 2012. He launched this application on 20 September 2012. It was heard on 27 September 2012, one day before the monthly salary run.

Prima facie right?

- 13] The applicant appears to vest his reliance on a *prima facie* right – although it is not spelt out in those terms – on the following two allegations:

13.1 He has not been found guilty of any misconduct; and

13.2 The statements and affidavits attached to a “report to the employer representative” are fabricated and contradictory.

- 14] In order to decide whether or not the applicant had a *prima facie* right not to be suspended, the Court must have regard to regulation 13 of the SAPS Discipline Regulations.³ Under the heading, “**Precautionary suspension**”, it reads:

“(1) The employer may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner.

(2) The National or the Provincial or Divisional Commissioner (the Commissioner) may suspend the employee without remuneration, if the Commissioner on reasonable grounds, is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in annexure A and that the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed: provided that –

(a) before suspending an employee without remuneration, the employee is afforded a reasonable opportunity to make written representations;

³ GN 643 published in *Government Gazette* No 28985, 3 July 2006.

- (b) the Commissioner considers the representations and informs the employee of the outcome of the representations;
- (c) the disciplinary process must be initiated within 14 calendar days of the date of the decision to suspend the employee without remuneration; and
- (d) if the disciplinary process is not completed within 60 calendar days from the commencement of the suspension, the question of continued suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the Commissioner must consider. The Commissioner must take any decision on continued suspension within 7 calendar days of receiving written representations on continued suspension and informed the employee of the outcome of the representations. A decision that the suspension continues, may only be for a further period of 30 calendar days.

(3) A suspension is a precautionary measure.”

- 15] A number of issues become apparent when one reads this regulation. Firstly, the opportunity to make written representations is prescribed only in terms of regulation 13(2)(a), i.e. in cases where the Commissioner considers suspending the employee without remuneration. Regulation 13 (1), dealing with suspension on full remuneration, does not prescribe such a procedure. Secondly, the Commissioner may only suspend the employee without remuneration if he or she is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in annexure A to the regulations. That annexure includes, *inter alia*, corruption and defeating the course of justice. Thirdly, suspension is a precautionary measure and not a disciplinary sanction.
- 16] It is immediately clear from the regulation that an employee does not have the right not to be suspended, provided that it is done in terms of the regulation.
- 17] The fact that the applicant has not been found guilty of misconduct, is

entirely irrelevant to the suspension. The regulation makes it clear that it is a precautionary measure taken before any misconduct has been proven. That leg of the applicant's argument has no merit.

- 18] The question then remains whether the Commissioner has complied with the regulation. On the applicant's own version, it appears that he has. The Commissioner issued a notice to the applicant giving him the opportunity to make representations as envisaged in regulation 13 (2)(a). Mr *Nxongco*, for the applicant, attempted to argue that the notice was issued in terms of regulation 13(1). He made out no basis for that argument. Firstly, the notice does not refer to regulation 13(1). Secondly, that regulation does not prescribe an opportunity to make representations. Thirdly, the notice refers to "serious misconduct" in the form of corruption and defeating the ends of justice, both categories of misconduct that are envisaged by regulation 13(2) read with annexure A to the regulations.
- 19] The applicant acknowledges that he did, in fact, submit written representations. He had an adequate opportunity to do so. He was fully aware of the serious allegations against him, and those allegations appear to have at least some substance, having regard to the affidavits and statements filed by fellow employees and included in the court papers. There is nothing to gainsay the allegation by the Commissioner in the notice of suspension dated 12 September 2012 in which the Commissioner states that he had received and considered the applicant's submissions before deciding to suspend him.
- 20] It is clear from the foregoing that the respondents have followed the prescribed procedure in terms of regulation 13. In those circumstances, the applicant has not established a *prima facie* right not to be suspended.

Absence of alternative remedy

- 21] The Labour Appeal Court has recently pointed out in *Gradwell*⁴ that:

"Disputes concerning alleged unfair labour practices must be referred to the

⁴ *Member of the Executive Council for Education, North West Government v Gradwell* (2012) 33 ILJ 2033 (LAC) para [46].

CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate when the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. 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 be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for the applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.”

- 22] In the current case, the applicant has not referred an unfair labour practice dispute in terms of s 186(2)(b) of the LRA to the bargaining council. He has an alternative remedy but has elected not to make use of it. In the light of the binding authority in *Gradwell*, this is another reason why he has not satisfied the requirements for urgent interim relief.

Apprehension of irreparable harm

- 23] It is so that the applicant will suffer some form in the form of loss of remuneration during his suspension. It is not clear, though, that the harm will be irreparable. The disciplinary process must be initiated within 14 days. It must be completed within 60 days, unless the employee has been given a further opportunity to make representations why it should not be continued; and even then, he may only be suspended for a further period of 30 days.⁵
- 24] Should the misconduct not be proven, the applicant will have a claim for the employer to reimburse his remuneration for the period of the suspension.

⁵ Regulation 13(2)(c) and (d).

- 25] Considering this aspect together with the absence of a *prima facie* right and the applicant's failure to make use of an alternative remedy, his claim for urgent relief cannot succeed.

Balance of convenience

- 26] Insofar as the balance of convenience still has to be considered, given the view I have taken of the other prerequisites for urgent interim relief, it must be accepted that the applicant will suffer inconvenience for at least a certain length of time. On the other hand, the respondents have acted in terms of the regulations that bind employer and employee. The fact that the employee will suffer some inconvenience does not, on its own, entitle him to the relief sought.

Costs

- 27] The applicant's claim is without merit. The matter was opposed, albeit that the respondents have not had the opportunity to file answering papers and Mr *Titus* argued the matter on the applicant's papers. There is no reason why costs should not follow the result.

Order

- 28] For these reasons the application was dismissed with costs.

Steenkamp J

APPLICANT: M Nxoncgo of Mkhize attorneys, Durban.

RESPONDENTS: M Titus

Instructed by the State Attorney, Durban.