IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D 23/2022

Not Reportable

In the matter between:

NOMUSA JUDITH DLAMINI Applicant

And

MEC FOR EDUCATION KWAZULU NATAL Respondent

Heard: 11 February 2022

Delivered: 06 August 2022

JUDGMENT

GOVENDER AJ

INTRODUCTION

[1] The Applicant launched an urgent application wherein she seeks the following orders:

a. that the continuation of the suspension from her position as Deputy Director General, Institutional Development and Support Branch, under the Department of Education, KwaZulu-Natal, is unlawful.

b. that the Respondent is directed to uplift the suspension forthwith and to allow the Applicant to return to work or to render her services immediately.

c. that the Respondent and/or any of the employees of the Department responsible for management of security guards, be restrained and interdicted from preventing the Applicant from accessing the premises at 47 Burger Street, Anton Lembede Building, Pietermaritzburg and/or to render her services at any other place as circumstances may require from time to time, including official events arranged by the Department and she seeks that 1.1 above shall operate as interim relief. Further, that the Respondent pays the costs of the application.

[2] It's trite that ordinarily a court would be reluctant to entertain these kinds of applications considering the fact that a suspension can be properly challenged in terms of an unfair labour practice and the prescribed dispute resolution provided under the Labour Relations Act (LRA)[1]. Further, I am mindful that urgent applications are often abused by litigants who seek to bypass these prescribed dispute resolution processes.

[3] Now the opposition to this application, apart from that it lacks urgency, is the fact that the Applicant ought to pursue her dispute, which the Respondent alleges amounts to an unfair labour practice before the Bargaining Council and not before this court. The Respondent submits that the court lacks jurisdiction to hear this application, in light of the Steenkamp and Others V Edcon Ltd [2] .

[1] Act 66 of 1995 as amended.
[2] (2016)37ILJ 564(CC).

[4] The Applicant avers that her suspension is unlawful, and that the relief sought herein is not based on the unfairness of the suspension.

[5] On that basis, the simple question to be answered is whether the Applicant has made out a proper case of compellingly urgent and extraordinary circumstances to justify the intervention of this court. If not, the matter must be dismissed.

[6] In the case of **Booysen v Minister of Safety and Security & Others**[3], it was held as follows:

> "*Such an invention should be exercised in exceptional circumstances. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive*."

Analysis/ Evaluation

[7] The Respondents raised opposition that the relief sought must be interim not only in form but in substance and the court must not only look at the form of an order but also its effect. The Respondents further submit that notwithstanding the form in which the relief is sought, it contains all the hallmarks of finality.

[8] Further, the Respondents submit that the jurisdictional objection is unassailable and dispositive of the matter. The Respondents claim that the issues whether the court has jurisdiction to entertain a claim for final relief on the basis of what is alleged to be an unlawful, invalid suspension in the absence of locating the claim in a cause of action justiciable by this court.

[3] (2011) 32 ILJ 112 (LAC) at para 54

[9] The Respondents rely on the authority of **Shezi v SA Police Services & Others**[4] where van Niekerk J held that the following paragraphs 10 – 13:

> "*What this requires is that a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction to this court to adjudicate the dispute. It is thus incumbent on an Applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction in this court to entertain the claim. Jurisdiction, of course is to be determined strictly on the basis of the Applicant's pleadings; the merits of the claim are not material at this point. What is required is a determination of the legal basis of the claim and then an assessment of whether the court has jurisdiction over it."*

[10] The Respondents further point out with reference to **Steenkamp & Others v Edcon Limited** (Numsa intervening)[5] that:

> "*When an Applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA, and this court has no jurisdiction to make any determination of unlawfulness. If a remedy is sought under the LRA, the Applicant must categorise the alleged unlawfulness as unfairness...By extension the same principle applies to other forms of employer conduct which I allege to be unlawful...Further, this court has no jurisdiction to determine the fairness of employer action where the nature of the dispute is one that requires it to be determined by arbitration."*

[11] Further submissions are that the Applicant has now firmly pinned her colours to an unlawful / invalid suspension cause of action and has failed to identify the provision in the

[4] 2021 42 ILJ 184,
[5] 2016 37 IRJ 564 (CC)

LRA or any other law which confers jurisdiction on this court to adjudicate the unlawfulness of a suspension.

[12] The Applicant submits that the facts of this case when individually and/or cumulatively considered present exceptional circumstances to allow for her case to be dealt with directly by the Labour Court instead of the Bargaining Council.

[13] The Applicant contends that there is no basis to continue to suspend her as the disciplinary hearing which led to a suspension has been finalised in totality. The Applicant returned to work, reported to duty for two days and the next day was not permitted to resume duties and was informed that she was once again on suspension. She alleges that she was welcomed back to the work by the then action HOD, Mthembu. She resumed her duties. However, she was informed on the 09th of December that the "MEC said she must go and get an award from the Bargaining Council if she wanted to come back to work.[6]

[14] I pause to mention that the Applicant was Deputy Director General at the time, she occupied a senior post and had 04 Chief directors and 19 directors under her supervision. [7] .

[15] The Applicant's reasons for the exceptional and compelling reasons for the court's interventions are:

> 15.1 the Applicant together with Bridglal and Madlal, were subjected to a disciplinary hearing. The Applicant faced the same charges as the other two except for one further, charge 6. The hearing was before chairperson Adv Poseman, who ruled in favour of the employees. she found the Respondent had waived its right to charge the employees given the long delay of 22 months that had transpired before the Respondent charged the Applicants.

[6] Para 10.6 of the founding affidavit at page 15 of the Index
[7] Para 11.12.12 at page 18 of the Index

15.2 The Applicant and other employees were suspended pending the outcome of the hearing. After the ruling, the employer took the ruling on review. However, the employer continued to suspend the employees. Bridgelal referred an unfair suspension dispute the bargaining council and was successful with an adverse costs order against the employer. The facts of Applicants case and Bridglall case are a blueprint similarity of each other.

15.3 The Applicant resumed work and was on duty for two days and then told that she was suspended once again and must not return to work till the review is finalised.

15.4 She was most disturbed by this conduct and claims its unlawful.

15.5 It is common cause the review is pending but are no valid reasons her continued suspension pending the outcome of the review.

15.5 There is no danger of her interfering with witnesses as the investigation is complete via an investigation report and further the report was finalised in 2018.

15.6 Further given the finding of the commissioner in Bridglall matter her suspension.

[16] The Applicant maintains strongly that this case is not about the fairness of the suspension but rather whether her suspension is lawful and/or valid and, therefore, the court has jurisdiction given the exceptional circumstances to hear this matter. The Applicant referred to the case of **Member of Executive Council for Education, Northwest Provincial Government v Gradwell**[8] where the court confirmed the jurisdiction of the Labour Court to entertain an urgent application specifically related to the uplifting of a suspension but said that it should only be entertained in extraordinary or compellingly urgent circumstances.

[8] 2011 (32) ILJ 112 (LAC) at para 54

[17] The Applicant also referred to the case of **Mbatha v Ehlanzeni District Municipality & Others**[9] which concerns a delegation of the power to suspend the mayor when this power was not capable of being so allocated. It was held that a suspension would be unlawful in instances where the right or power of an employer to affect his suspension is prescribed by specific regulations and that these regulations were not complied with by the employer. The unlawfulness is found in the employer not complying with its own rules. This regulation (rules) can be done in the form of a Disciplinary Code and Procedure Collective Agreement, statutory provisions, or other regulatory provisions.

[18] The Applicant maintained that the suspension of the Applicant falls away after 60 days unless the Chairperson of the disciplinary hearing has extended it. In this case, the disciplinary hearing has been finalised. The Chairperson of the disciplinary hearing made a ruling that the employer waived its right due to an inordinate delay of over 22 months, to discipline the Applicant and the other co-employees and, therefore, the employer could not proceed to discipline the Applicants.

[19] In Gcaba v Minister of Safety and Security and others [10] , it was said that jurisdiction means the power of competence of a court to hear and determine an issue between the parties. In the case of an application such as the current application, in which urgent intervention in the suspension of an employee is sought, the Labour Court has jurisdiction in terms of section 157[11] and the competence and power in terms of section 158[12] , to adjudicate the dispute.

[20] I am mindful that the view of the court is sometimes that Labour Court should ultimately decide not to intervene but dismiss the application because the Applicant should

[9] 2008 29 ILJ 1029 LC
[10] (2010) 31 ILJ 296 (CC) at para 24
[11] Section 157(1) reads: "*Subject to the Constitution in section 173, and except where this Act provides otherwise, the Labor Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labor Court*."
[12] Section 158(1) reads: "*(1) The Labour Court may (a) make an appropriate order, including (i) the grant of urgent relief; (ii) an interdict; (iii) an order directing performance of any particular Act which order when implemented will remedy a wrong and give effect to the primary objects of this Act…"*

have followed the dispute resolution process prescribed by the LRA and not burden this court with the matter at this stage, is not an issue of jurisdiction. It is simply a decision made by the Labour Court to the effect that the Applicant has a bad claim. It must also be considered that in order for the court to decide that the Applicant's claim is bad it has to follow that the court must have jurisdiction to do so. In **Mkhanya v University of Zululand**[13] it was held as follows:

> "...*I have pointed out that the term "jurisdiction", has been used in this case and in related cases that I have mentioned, describes the power of court to consider and either uphold or dismiss a claim and have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) called for the exercise of juridical power as much as it does to uphold the claim..."*

URGENCY

[21] In **Jiba v Minister: Department of Justice and Constitutional Development & Others**[14] it was held:

> *"Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an application is not entitled to rely on urgency that is self-created when seeking a deviation from the rules."*

[22] An Applicant has to set forth explicitly the circumstances which he avers that render the matter urgent. More importantly, the Applicant must state the reasons why he claimed that he cannot be afforded substantial redress at a hearing in due course.

[13] (2009) 30 ILJ 153 SCA at para 52
[14] 2010 (31) ILJ 112 (LLC) at para 18

[23] The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course.[15] (Northam Platinum case).

[24] Now, in **Northham Platinum** supra, consideration was given to the fact that when an Applicant seeks final relief the court must even more circumvent when deciding whether or not urgency has been established and that in simple terms the Applicant must make out an ever-better case for urgency. Of course, another consideration is the possible prejudice the Respondent might suffer as a result of the abridgment of the prescribed time periods and an early hearing of the determination. The relief sought here does appear in effect amount to final relief and I will address this issue later.

[25] The Applicant returned to work on 8 and 9 December 2021 and was thereafter suspended again immediately. Surely, the resumption of duties terminated any previous "suspension." This application was then launched on 20 January 2022. The explanation for the urgency is set out in paragraph 16 of the founding affidavit at page 21 of the index. The Applicant alleges the matter is urgent on the following grounds:

1) the nature of the relief sought in this application is urgent.

2) On 7 to 8 December 2021, she returned to work and was welcomed and reusmed duties. On 9 December 2021 she was refused entry into the premises by security guards. The reason she could not launch the application earlier from 10 December was because the attorneys' offices were closed for the December holidays and only returned to work on 10 January 2022.
3) The Applicant managed to consult with counsel on 13 January and this application was drafted and launched on 19 January 2022. The Applicant maintained she had not been sitting on her laurels and not doing anything about this matter. She did try to initially resolve the matter internally with the employer and even returned to work as she did on 7 and 8 of December.

[15] **Association of Mine Workers and Construction Union & Others v Northham Platinum Ltd & Another** 12 (2016) 37 ILJ 2840 LC at para 21.

[26] I accept that this matter is urgent given the extraordinary conduct of the employer herein and the unique circumstances of the Applicant reporting to work, being accepted for two days, and then informed she was once again on suspension. Further the explanation tendered by the Applicant is in my view also reasonable and I do not find that she delayed or was dilatory in bringing this application.

Are they any compelling and exceptional circumstances justifying the Courts intervention herein?

[27] I make it clear that the court is not concerned with the unfairness of the suspension because if the court was tasked to deal with the unfairness of the suspension, which would be a hearing before the Bargaining Council. It is trite that compliance with an employer's Disciplinary Code and whether the Applicant was given a fair and proper opportunity to make representations prior to suspension or suspended for 60 days or for valid reasons etc., is not an issue that burdens this court. Those kinds of issues are squarely reserved for determination by an arbitrator when deciding an unfair labour practice dispute in terms of the normal dispute resolution processes under the LRA.

[28] What I am concerned with is whether or not the lawfulness of the suspension is aimed at an attack on the validity of the decision to suspend the Applicant in the first place. The Applicant has argued that it was not competent to suspend her when her suspension was set aside, and she had resumed work for 2 full days and was thereafter suspended again on the basis that there was a review pending. I rejected the Respondents contention that she was unlawfully back at work as the undisputed evidence is that she was welcomed back by Mthembu. So Mthembu's conduct and her resuming duties for two days was a tact waiver of any "suspension", as significantly Mthembu was the HOD. It is clear that there has to be some basis for the suspension and in terms of the employer's own Rules and Disciplinary Code there are no provisions to continue with her suspension. There are no provisions in terms of Resolution 1 of 2003 or any other policy or the SMS handbook which justifies such conduct on the part of the employer. This conduct is clearly unlawful/invalid and a blatant abuse of power. Further, the Applicant was suspended on full pay, and this also amounts to wasteful and fruitless expenditure in the circumstances.

[29] I find that there are exceptional and compelling reasons to intervene here as the conduct of the Respondent is shocking. There is absolutely no valid reason as to why the Applicant was suspended again or even suspended pending a review. The reasons advanced in the letters of May and 10 December 2021 for continued suspension is fatally defective and baseless[16]. The employer had no regard for its own internal disciplinary policy and the Item 7.2 of resolution 1 of 2003. Placing an employee on precautionary suspension is done in very specific circumstances and it's trite that the continued suspension beyond 60 days is the prerogative of a chair of the disciplinary hearing. The Respondent, has acted as a law upon themselves here, resulting in a grave injustice to the Applicant. Such injustice is deserving of the Court's intervention. The Respondent's action is clearly unlawful and invalid. The issue of whether the Applicant's suspension was lawful is an issue distinct and separate from whether it was fair. And in this regard, I find that there is not another mechanism to obtain substantial redress in due course.

[30] Turning to the issue of prejudice, I accept that even this consideration favours the Applicant. Clearly the Applicant is prejudiced as she is unable to continue with her employment, she suffers reputational harm due to her continued suspension and she is prejudiced in the conduct of her duties as she is excluded from the workplace without cause or reason. Further, the longer the suspension endures the more difficult it would be for a person fulfilling the kind of functions of the Applicant who occupies a senior position within the employment of the Respondent. I find that it is in the interest of justice and proper statutory functions that the employer is meant to discharge as a Government Body that the Applicant's suspension be uplifted forthwith.

[31] In **SA Municipal Workers Union on behalf of Mathole v Mbombela Local Municipality**[17] the court considered a situation where an employee was suspended without compliance with the specific process in a statutory regulation and accepted this established urgency. The court said the following:

[16] Annexure "NJD9" at page 70 of the Index
[17] (2015) 36 ILJ 134 LC

"*In failing to comply with the requirements of regulation 6 the Respondent infringed on a clear right of the Applicant not to be suspended without a prior hearing. The harm that the Applicant suffers pending the finalisation of the disciplinary hearing is not financial because he receives his salary during the suspension. The irreparable harm that he suffers has to do with his dignity and freedom to work. The impact of the suspension and the freedom to work in dignity of the suspended employee was stated in Minister of Home Affairs & Others v Watchmen Nuk & Others in the following terms:*

> *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, as submitted by the Respondent's counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem in the sense of self-worth – the fulfilment of what it is to be human – is most often bound [inaudible] being accepted as socially useful."*

[32] Having considered all the facts I, therefore, find that exceptional and compelling reasons to declare the suspension of the Applicant unlawful. There is urgency in dealing with this matter and the Applicant stands to be greatly prejudiced if the court does not intervene.

[33] I am satisfied that the Applicant has met the requirements necessary in order for her to obtain the relief that she seeks. The Applicant has a clear right to the relief she seeks and there is certainly no other alternative remedy available to her in the circumstances to address the unlawfulness of this continued suspension, and the considerations of prejudice undoubtedly favour her. I do see the need to perpetuate these proceeding any longer. All the pleadings are closed, and the court is in a position to finally dispose of this matter. I therefore find that it will be in the interests of justice and fairness to grant final relief to the Applicant as she has satisfied the court in that regard. The Applicant's application is therefore granted.

COSTS

[34] This then leaves the issue of costs. In terms of section 162(1) and (2) of the LRA I have wide discretion when it comes to the issue of costs.

[35] I find the conduct of the Respondents to be an absolute abuse of power. I submit that there is a lesson to be learned and the employers must be mindful that they cannot abuse their powers to achieve nefarious agendas and they are duty bound to ensure, even when instituting disciplinary hearings, that they act with a sense of fairness at all times to their employees.

[36] In this case, I am mindful of the factual background leading to this application. Further, Briglall had taken his disputes to the Bargaining Council with very similar facts to the Applicant. The Bargaining Council made a ruling setting aside their suspensions. Together with an adverse cost against the Respondent.

[37] Despite this, the Respondents still continued to suspend the Applicant when they ought to have applied their mind to the situation of Brigelall and considered that the facts are the same and uplifted the Applicant's suspension rather than suspend again in December and compel her to approach the court for intervention. There were letters sent off by the Applicant's representatives seeking to resolve the issue with detailed reasons set out therein However, still good sense did not prevail. The Respondent stubbornly maintained that the Applicant must approach the Bargaining Council for her own ward.

[38] I find that there are sufficient reasons to depart from the Constitutional Court decision in **Mzungu v Premier of the Province of KwaZulu-Natal & Others**[18] and I consider there to be sufficient reasons to exercise my discretion as to award a punitive cost in this matter.

[39] For all the reasons as set out above, I make the following order:

[18] 2018 39 ILJ 523 CC at para 25

a. The application is heard as one of urgency.

b. The Applicant's suspension by the Respondent is declared to be unlawful.

c. The Respondent is directed to uplift the Applicant's suspension and allow the Applicant to resume her duties with immediate effect from date of this order.

d. The Respondent is ordered to pay the costs of this application.

N GOVENDER AJ

Acting Judge of the Labour

Court of South Africa

Appearances:

On behalf of the Applicant: Adv S Tshangana

On behalf of the Respondents : Adv L Naidoo