IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

NOT REPORTABLE

CASE NO: J49/09

2009-01-21

In the matter between

TDH RAMPHELE **Applicant**

And

NGAKA MODIRI DISTRICT MUNICIPALITY **Respondent**

J U D G M E N T

VAN NIEKERK J

[1] The applicant is the manager of the respondent, to which I shall refer as the municipality. He brings this application as a matter of urgency to set aside his suspension and the institution of disciplinary proceedings against him. The applicant disavows any reliance on the Labour Relations Act; he founds this application on his contract of employment, alternatively the right to fair administrative action guaranteed by Section 33 of the Constitution.

[2] The applicant was employed as a municipal manager by the respondent with effect from 1June 2007. His contact of employment is

expressly made subject to the Municipal Finance Management Act, 2003.

[3] I refer in this regard to clause 1 of the applicant's contract of employment. Also relevant to these proceedings is clause 14 of the applicant's contract, paragraphs 1 and 2 which reads as follows:

> *"14.1 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 well-being or safety of any municipal property, provided that before an employee is suspended as a precautionary measure, he must be given an opportunity to make representations of why he should not be suspended.*
>
> *14.2 The employee who is to be suspended must be notified in writing of the reasons for his suspension, simultaneously or at least within 24 hours after the suspension. He shall respond within 7 working days".*

[4] The applicant and the executive major have been involved in disagreements regarding the expenditure of municipal funds. The applicant has set out in detail his allegations of mismanagement and the steps he has taken to address his concerns as well as the response of he executive major. Regrettably, the respondent has chosen to respond to most of the applicant's averments with a broad denial and suggestions that they are scandalous and vexatious. This has not assisted the court in its task, especially in relation to the resolution of factual issues.

[5] Be that as it may, what is not disputed is that on 17 December 2008 the council adopted a resolution, which reads as follows:

> *"Resolve that:*

1. *The municipal manager be put on precautionary suspension with effect from 17 December 2008 pending the representations to the council by 30 December 2008 on why his precautionary suspension may be stayed pending the outcome of the disciplinary hearing against him and such steps as may be necessitated by the outcome of the disciplinary hearing.*
2. *Council appoints Mrs P Semenya in the employ of the municipality to act as the municipal manager pending the outcome of the disciplinary hearing to execute the duties, functions, rights and obligations of the council with remuneration and benefits attached to the office of municipal manager.*
3. *The acting municipal manager be delegated powers to deal with all the administrative issues, to do all necessary to oversee the expeditious disciplinary hearing against the municipal manager, including but not limited to appoint the prosecutor and the chairperson or any other person or services that may be necessary for the purposes of a disciplinary hearing.*
4. *The disciplinary proceedings be effected immediately and be finalised within a reasonable time."*

[6] On 17 December 2008, the executive major wrote a letter to the applicant. The letter reads as follows:

"Dear Mr Ramphele,

The letter of precautionary suspension and presentation:

1. *In terms of the council resolution number 84/2008 dated 17 December 2008, you are hereby given precautionary suspension with immediate effect with full remuneration. The council believes that your continued presence in the municipal premises and in the office of municipal manager may have adverse effects on the ability of witnesses who are required to testify against yourself.*

Further the council is of the opinion that you may not be able to properly execute the duties of the municipal manager, while at the same time, preparing for your defence."

[7] Paragraph 5 of the letter requires the applicant to:

"Immediately deliver the access card or keys of the municipal offices in your possession or control to the office of the executive major including documentation, equipment in your possession."

The letter is signed by one councillor Themba Ngkwabeni, the executive major.

[8] The applicant was on leave from 13 December 2008 until 31 December 2008 and it was only on his return from holiday that he became aware of the letter of suspension. On 7 January 2009, the executive major again wrote to the applicant, this time issuing a notice instructing the applicant to attend a disciplinary hearing on 12 January to answer to 16 charges of misconduct. The hearing was postponed to 19 January and then again stood down until noon of 20 January.

[9] I do not intend dealing with Mr Bruinders's submissions regarding the applicant's administrative law rights. In the case of *Chirwa v Transnet Limited & Others, 2008 (3) BCLR 251 (CC)*, the majority of the Constitutional Court held that a public sector employee who claimed that she had been unfairly dismissed was not entitled to rely on Section 33 of the Constitution to claim relief against her employer and that she was obliged to utilise the dispute resolution procedures open to her under the Labour Relations Act. There is therefore no merit in his line of argument in this regard.

[10] Insofar as the applicant's claim is based on his contract of

employment, Mr Makaba, who appeared for the respondent, submitted that the *Chirwa* judgment precluded the applicant from seeking relief in this court in relation to his suspension and the pending disciplinary proceedings, other than in terms of the Labour Relations Act. I do not agree with that submission. In *Magotle v The Premier of the North West Province & Others*, (J2622/09, *5 January 2009)* I had occasion to say the following:

> *"Although the judgment of the Constitutional Court in Chirwa is an obvious and clear endorsement of the virtues of the mechanisms, institutions and remedies crafted by the LRA and the merits of what Skweyiya J, (referring to the explanatory memorandum accompanying the LRA) termed a one stop shop for all labour related disputes established by that statute. I do not understand the judgment expressly to exclude the right of an employee to pursue a contractual claim, either in this court by virtue of the provisions of section 77(3) of the Basic Conditions of Employment Act or in a civil court with jurisdiction. Nowhere in the judgment is it unequivocally stated that the effect of the legislative reforms effected after 1994 and in particular the creation of specific statutory remedies to address unfairness and in common practices, is to deprive an employee of any common law contractual rights or the right to enforce them in a civil court or in this court in terms if Section 77 of the BCEA. If the Constitutional Court in Chirwa had intended to make a ruling to this effect, overriding as it would have done, a consistent line of judgments by the Supreme Court of Appeal, it would have done so in expressed terms." (See:* Paragraph 28 of the judgment.)

[11] Nor do I consider that Mr Makaba's jurisdictional challenge based on clause 20 of the applicant's contract of employment has any merit. That clause provides the following:

> *"Jurisdiction: The parties consent firstly to the jurisdiction of*

the

Commission for Conciliation Mediation and Arbitration (CCMA) and if the CCMA is not able to adjudicate the dispute, the courts of the Republic of South Africa with regard to any claim resulting or arising from this contract."

[12] This clause, properly understood, does not oblige the applicant to resort only to the remedies available under the Labour Relations Act, nor does it oblige him only to refer any dispute with his employer to the CCMA. The CCMA has no jurisdiction in respect of contractual claims nor claims based directly on constitutional rights. There is nothing, in my view, in the applicant's contract that precludes him from seeking the relief he does in this court, based, as it is, on their contract and the contractual remedies that flow from it.

[13] I turn first to the applicant's suspension. Clause 14 of the applicant's employment contract, properly constructed, requires the respondent to have a justifiable reason to believe that the applicant is engaged in serious misconduct. Secondly, there must be some objectively justifiable reason to deny the applicant access to the workplace, based either on any jeopardy to an investigation that his continued presence might pose, or any threat to any person or property. Thirdly, the applicant must be given an opportunity to make representations as to why he should not be suspended before a decision to that effect is taken.

[14] Clause 14.2 sits unhappily with this provision, since it refers to a right to make representations regarding the reasons for suspension within 7 days of that suspension having been effected. I agree with Mr Bruinders, who appeared for the applicant, that what clause 14. envisages is a two-tier approach to a suspension, i.e. a right to be heard before any decision to suspend is made, and a right to challenge the reasons for any decision to suspend within 7 days of that decision.

[15] In any event, in my view, the contractual obligation of fair dealing between employer and employee requires that an employee be afforded a hearing prior to any decision by an employer to suspend him or her. In that regard I refer to the decision in *Magotle* and particularly the reference to the decision of the Cape Provincial Division in the case of *Muller v Chairman, Minister's council House of Representatives, 1991 (12) ILJ 761 (C)*. In that case, the court dealt with the application of the *audi alteram partem* rule to a suspension in a statutory context. The court's observations of the unfairness necessarily visited on a suspended employee are relevant in the present context and relevant further to the nature and extent of the contractual obligation of a fair dealing to which I have referred.

[16] In the present instance, the council resolved to suspend the applicant without any notice to him and without a hearing. In doing so, in my view, it acted in breach of clause 14 of the applicant's contract and the obligation of fair dealing by which the respondent is bound. Second, insofar as the pending disciplinary proceedings are concerned, this court has previously dealt with the potential conflict that might arise between a municipal manager and an executive major. In the case of *Mbato v Elanzeni District Municipality & Others, 2008 (5) BLLR 417 (LC)*, my colleague Cele AJ, as he then was, said the following: (I quote from paragraph 22 of the judgment)

> "*It is inevitable that in the execution of their statutory duties, a conflict might arise between the municipal manager and the executive major. It would not be desirable in the administration of justice that the municipal manager must live with a constant fear that in the event of such conflict the municipal manager is at the mercy of a major with disciplinary powers. Justice would be better served in my view, if both officials involved in a conflict situation, make representations to*

the council which in turn can, after a deliberation on the matter , decide on any disciplinary actions that ought to be taken and if so, against whom. The composition of the council will not detract from the ability of the council to deliberate on whether or not disciplinary measures need to be resorted to. My considered opinion is that the power to discipline the municipal manager must reside in the council. I conclude therefore that this power to discipline a municipal manager is vested in the council and is not capable of being delegated to an executive major."

[17] This brings me to the resolution adopted by the council on 17 December 2008. The resolution refers in vague terms to "the disciplinary hearing" against the applicant, referring, it would seem, to a decision already taken by an unknown party to the effect that the applicant should be disciplined. The resolution does not unequivocally reflect a decision by the council to institute disciplinary proceedings against the applicant, nor does it reflect the grounds on which the applicant is to be disciplined. In short, only the council is entitled to discipline the applicant. There is no resolution before me that authorises disciplinary action against the applicant on the grounds reflected in the charges brought against him. In other words, there is no resolution that any person properly delegated by the council can implement.

[18] I wish to emphasise that I am in no way calling into question the validity of the resolution adopted by the council on 17 December 2008. The applicant does not challenge the validity of the resolution *per se* nor does he dispute the authority of the council to discipline him. The point he makes quite simply is that in terms of his contract of employment, being subject expressly, as it is, to the relevant legislation, the council must resolve to discipline him on grounds that are specified. In this case, that did not happen and the purported

notice to attend a disciplinary enquiry issued by the executive major, in my view, constituted a breach of the applicant's contract.

[19] For these reasons, I am satisfied that the applicant is entitled to the relief he seeks, at least in the form of the setting aside of his suspension and the notice to attend a disciplinary hearing.

[20] In coming to this conclusion, I wish to emphasise that I make no judgment on the merits of the charges of misconduct levelled against the applicant. They are serious and will no doubt be dealt with in due course in an appropriate forum and in conformity with the respondent's obligations under the contract of employment that it concluded with the applicant.

[21] Finally, I wish to make a number of additional points of a more technical nature directed at certain issues raised by the respondent. First, there is the question of joinder, the respondent submits that the applicant's failure to join the council is fatal to this application.

[22] In *Gordon v Department of Health, 2008 (6) SA 522 (SCA),* the Supreme Court of Appeal reversed the decision by the Labour Appeal Court on the question of joinder and in doing so reaffirmed the test that is to be applied, i.e. whether a party that is alleged to be a necessary party, has a legal interest in the subject matter which may be affected prejudicially by the judgment of the court in the proceedings concerned.

[23] Here, as I have already noted, the applicant does not seek to set aside the council's resolution adopted on 17 December 2008. The relief sought affects only the applicant's relationship with the respondent, his employer and as I have already noted, it is not the lawfulness of the council's resolution that is at issue in these proceedings, rather than the conduct of the respondent and in particular the actions of the executive major.

[24] Finally, in relation to the question of urgency, I am satisfied that the application is urgent. The applicant became aware of his suspension on 31 December 2008 on his return from leave and became aware of the pending disciplinary hearing on 8 January 2009. His attorney attempted to obtain a copy of the resolution that is at the heart of these proceedings, a letter written on 6 January 2009 requesting a copy of the resolution went unanswered and the applicant was obliged to obtain a copy by other means. He obtained a copy of the resolution on 12 January 2009, consulted his legal representatives on 13 January 2009 and signed the founding affidavit on 15 January 2009. I am satisfied that in these circumstances, the applicant has not been dilatory in exercising his rights. Setting down the application for hearing on the normal motion court roll would defeat the object of the application and effectively, in my view, deny the applicant the rights that he has elected to exercise under his employment contract.

[25] In relation to the remedy, the applicant seeks to have his suspension and the institution of the disciplinary hearing set aside. This nature of a contractual remedy is available to an applicant in these circumstances. When circumstances such as these have not been the subject of much judicial consideration, either in the case of *Boxer Super Stores, Mthatha v Benja, 2007 (28) ILJ 2209 (SCA),* the Supreme Court of Appeal affirming the contractual right to fair dealing as between employer and employee, further contemplated the remedies that may be available in circumstances where an applicant elected to rely on the fairness of the employer's conduct rather than the unlawfulness of that conduct.

[26] In that case, the court specifically alluded to the prospect of a competent remedy in the form of a setting aside in that case of a disciplinary hearing and in this regard, I refer to paragraph 10 of the judgment.

[27] In my view, the setting aside of both the suspension and the institution of the disciplinary proceedings is an appropriate remedy in the present instance.

I accordingly make the following order:

1. The applicant's suspension is set aside;
2. The institution of disciplinary action against the applicant in terms of the letter by the major of the respondent dated 7 January 2009 is set aside;
3. The respondent is to pay the costs of this application including the costs of two counsel.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of Hearing: 21 January 2009

Date of Judgment: 21 January 2009

Appearances:

For the applicant Adv T Bruinders SC; Adv N R Budlender

Instructed by Noko Incorporated

For the First Respondent Adv W R Mokhare

Instructed by Motaung Incorporated