IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J1229/09

In the matter between:

POPCRU OBO S.P MASEMOLA & 14 OTHERS APPLICANT

AND

THE MINISTER OF CORRECTIONAL

SERVICES RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction1

[1] This is an urgent application brought in terms of Rule 8 of the Labour Court Rules. The applicants seek to review and set aside the respondent's decision to suspend them.

[2] The application is opposed by the respondent.

The parties

[3] The applicant is POPCRU, a duly registered trade union acting in terms of section 200 of the Labour Relations Act 66 of 1995 on behalf of 15 of its shopstewards.

[4] The respondent is the Minister of Correctional Services and is cited in his official capacity as the Minister responsible for the Department of Correctional Services.

The facts

[5] On 15 June 2009, Masemola requested permission from management to address members of POPCRU after the morning briefing session. The purpose of the address was to give members feedback about recent developments relating to industrial action and the Occupational Specific Dispensation (OSD).

[6] He was granted the permission to address members of POPCRU at the Maximum and Youth Centres. He was not granted permission to address members at the Medium Centre because members had already dispersed after the morning briefing.

[7] Masemola, Rachidi and Mbokani addressed the members at the Youth Centre while Masoko addressed the members at the Maximum Centre. During the address and in response to a question, Masemola advised members at the Youth Centre that attending church and religious functions were not compulsory and no one can be forced to attend. Masoko also conveyed the same message to members at the Maximum Centre.

[8] None of the other employees addressed the meetings with regard to the issue of the Youth Prayer Day which was arranged by management.

[9] Despite that it was Masemola, Rachidi, Mbokane and Masoko who addressed the members, respondent suspended a total of 15 employees. The respondent issued identical suspension letters to all 15 applicants.

[10] The contents of the suspension letters are as follows:

"***SUSPENSION: YOURSELF***

It has come to the attention of Management that you intentionally and deliberately intimidated / negatively incited fellow employees not to attend an official event (Regional Youth Prayer Day) on 12 June 2009 at Baviaanspoort Management Area.

After considering the available information and your involvement onto this conduct, Management has decided to suspend you with immediate effect from your official duties.

You will remain suspended pending the finalization of the investigation into this matter. It is worth mentioning that this suspension holds no punitive measure, but to ensure that the rights of both parties (i.e the employer and the employee) are protected and respected. You will be contacted by an officially appointed Investigating Officer in due course.

Conditions of your suspension

1. *You must report at Employee Relation Office (Mr Mothapo) every Wednesday before 10:00*
2. *During the period of the suspension you are not allowed to enter the DCS facilities without the permission of the Area Commissioner or the AC Corporate Services as indicated in Par. 1. Supra.*
3. *You are expected to be cooperative towards the Department of Correctional Services and act responsibly*
4. *You will till be entitled to your salary excluding overtime and danger allowances for obvious reasons.*
5. *In terms of the Correctional Services Regulation 72(3) you are not allowed to wear uniform or use your identification card during your suspension*
6. *You are strongly warned against making threats to any person being*

involved in the case or to cause any person being involved in the case to be threatened.

You are therefore afforded the opportunity to respond within 24 hours as to why the suspension cannot stand as mentioned above.

Mr Matthee R *2009-06-12*

Area Coordinator: Corporate Services

Bavariaanspoort Management Area

[11] According to the applicant, respondent failed to inform the affected employees of its intention to suspend them from duty prior to the suspension. The employees were deprived of an opportunity to state their case before a final decision to suspend them was taken.

[12] Applicant stated that respondent is victimising the employees for representing POPCRU. Respondent does not have an objectively justifiable reason to deny the employees access to the workplace based on the intergrity of the investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy.

[13] Respondent has also failed to inform and consult the union before the suspension of the fifteen employees as they are all shopstewards. The result of the suspension is that union representatives were removed from the employer's premises and prevented from performing their activities as trade union representatives.

[14] Applicant was also deprived of an opportunity to make suitable alternative arrangements for the continuation of trade union activities as a result of the

suspensions. Applicant has a total of 19 shopstewards at Baviaanspoort Management Area. As a result of the suspensions, applicant is left with 4 shopstewards.

[15] Applicant stated further that Masemola is not employed at the Baviaanspoort Management Area but was suspended by the management thereof. Applicant submitted that Baviaanspoort management had no authority to suspend Masemola.

[16] On 17 June 2009, Applicant lodged an urgent application with the court seeking that the suspension of the employees should be reviewed and set aside. Applicant also requested that the respondent should be ordered to allow the employees to return to work.

[17] The application was served on the State Attorney on 17 June 2009 at 08h30.

[18] On 18 June 2009 both parties appeared before court and agreed that the respondent will file an answering affidavit by 16h00 on the same date. The case was stood down until 19 June 2009 at 10h00.

[19] Respondent has failed to file the answering affidavit on the 18th June 2009 at 16h00 as agreed. On 19 June 2009 respondent filed its answering affidavit with the court but did not serve same on the applicant.

[20] On 19 June 2009 both parties appeared in court but the case was postponed to 22 June 2009. Respondent handed applicant's counsel with its answering affidavit which was incomplete. The application was heard on 22 June 2009 but however

as at that date, respondent had not been served with the answering affidavit save an incomplete copy which respondent gave to applicant's counsel on 19 June 2009.

Point in limine

[21] On 22 June 2009 applicant raised a point in limine and argued that respondent failed to comply with an agreement reached in court that it will file an answering affidavit on 18 June 2009 at 16h00. As at the time of the hearing on 22 June 2009, respondent had not served its answering affidavit on the applicant's attorney of record. Applicant argued further that respondent should have applied for condonation for the late filing of the answering affidavit.

[22] In response, respondent argued that it underestimated the time allocated for compiling the answering affidavit hence its failure to comply with the time frames. Respondent argued that it attempted to serve on the attorneys of record by pushing the answering affidavit at midnight on the entrance door of the chambers.

[23] Having considered the point in limine and the response thereto, I am satisfied that respondent did not serve the answering affidavit on the applicant's attorneys of record. Respondent did not provide a reasonable explanation for its failure to serve the answering affidavit. The rules of court allow for service even by fax and thus respondent's failure to serve even by fax cannot be accepted. There is further no valid explanation as to why respondent only served an incomplete answering affidavit on applicant's counsel on 19 June 2009. Furthermore, since

19 June 2009, respondent still had ample opportunity to can serve the answering affidavit on applicant's attorney of record but did not do so even as at the date of hearing on 22 June 2009. In the circumstances, respondent conduct is unacceptable and the answering affidavit cannot be accepted.

[24] I will proceed and deal with the matter on an unopposed basis.

Legal position

[25] Rule 8(2) of the Rules of the Labour Court provides that: "*The affidavit in support of the application must also contain-*

(a) The reasons for urgency and why urgent relief is necessary;

(b) *The reasons why the requirements of the rules were not complied with, if that is the case; and*

(c) ....

[26] In University of the Western Cape Academic Staff Union & others v University of the Western Cape (1999) 20 ILJ 1300 (LC) at page 1303 para 12 -13 the court held that *"In my view the Labour Court would be failing in it stated task if it were to deny such relief even in circumstances where the unfairness sought to be prevented is very glaring. Experience has taught us that lateral conduct that ignores relevant provisions and any semblance of fairness. In certain circumstances the detrimental consequences of such conduct cannot be addressed by an award after arbitration or adjudication has taken place.*

I must hasten to add however hat in exercising this power the Labour Court should apply the same standards as the High Court. See Spur Steak Ranches Ltd v Saddles Steak Ranch 1996 (3) SA 706 (C) at 714B-C *where Selikowitz J said:*

"The well known requirements for the grant of an interdict are (1) a clear right or right prima facie established though open to some doubt; (2) a well grounded apprehension of irreparable harm if the interim relief is not granted and ultimate relief is granted; (3) a balance of convenience in favour of the granting of interim relief and (4) the absence of any satisfactory remedy".

[27] In Mogothle v Premier North West Province (2009) 30 ILJ 605 (LC) at para 39

"In summary: each of the preventative suspension must be considered on its own merits. At the minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing (obligation) of fairness on employers when they make decisions affecting their employees requires <u>first</u> that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct; <u>secondly,</u> that there is some objectively justifiable reason to deny the employee access to the workplace based on the intergrity of any pending investigation into the alleged misconduct or some other relevant factor that that would place the investigation or the interests of the affected parties in jeopardy; and <u>thirdly,</u> that the employee is given the opportunity to state a case before the employer makes a final decision to suspend the employee. (my underlining)

[28] In SAPO v Jansen Van Vuuren NO & others (2008) 8 BLLR 798 (LC) Molahlehi J stated at para 39 the following:

"There is, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid

reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words, unless circumstances dictate otherwise, the employer should offer an employee an opportunity to be heard before placing him or her on suspension".

Analysis

[29] As stated above, applicant filed this application as an urgent application. This court should therefore first determine whether the application is urgent or not.

Urgency

[30] I now proceed to deal with the question whether the application is urgent or not. The employees were served with the suspension letters on 15 June 2009 and the suspension was with immediate effect.

[31] POPCRU brought an application to set aside the suspension and to order the respondent to allow the 15 employees to return to work on their behalf to this court on an urgent basis on the 17th June 2009.

[32] When an applicant lodges an urgent application, there are requirements that need to be satisfied. The question to be asked is, have the grounds for urgency been established?

[33] In the founding affidavit, applicant submitted that the application is urgent and stated the following:

> 32.1The suspension has a detrimental impact on the 15 employees and prejudices their intergrity and reputation as union representatives as well as their job security.
>
> 32.2The suspension has a detrimental impact on the union and prejudices its functioning in the Department within the framework of applicable labour legislation.
>
> 32.3 The suspension has a detrimental impact on the relationship between the union and the Department and prejudices the possibility of continued sound labour relations between the parties.
>
> 32.4 It is in the interest of justice that the unfair suspension of shopstewards should be brought to the attention of the court.

[34] In this matter, the crucial issue is that applicant has lodged his application within two days from the date of suspension. This together with the negative impact which the suspension has on applicant's intergrity and reputation renders this matter to be urgent.

[35] In view of my finding that the matter is urgent, I should proceed and deal with the other requirements for granting urgent relief. As pointed out in *University of the Western Cape Academic Staff Union* above at para 13 "*... the well known requirements for the grant of an interdict are (1) a clear right or a right prima*

facie established though open to some doubt; (2) a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; (3) a balance of convenience in favour of the granting of interim relief and (4) the absence of any satisfactory remedy.

Clear right

[36] In this matter, the applicant has in the founding affidavit stated that the 15 of its members were suspended from employment. Applicant has also stated that the employees were suspended without having been afforded a chance to be heard. In view of the finding in the South African Post Office case that a suspension impacts on a person's reputation, **intergrity** and job security, I find that it is improper to suspend an employee without affording him an opportunity to provide reasons why he should not be suspended. Applicant has proved that the employees had a right to be heard prior the suspension and that the respondent had violated that right. This is in line with the decision in South African Post Office cited above.

Irreparable harm

[37] Taking into account the harm that applicant will suffer as a result of the upliftment of the suspensions, the harm is outweighed by the one to be suffered by the employees if the remain on suspension. Having found that the suspension has a negative impact on a person's dignity, the harm to the employee's reputation, dignity, intergrity and job security will perpetuate if the suspension

remains. Applicant has shown that it will suffer irreparable harm as a result of the suspension.

Balance of convenience

[38] I am of the view that the respondent will suffer no irreparable harm i the suspension is lifted. The allegations against the employees do not appear to be very serious forms of misconduct as they relate to what the employees said in a meeting. The respondent could have completed the investigations by now since the date of the suspensions.

Alternative relief

[39] The issue which applicant is complaining about is the suspension of its members. I am of the view that a claim of damages will not correct the harm that applicants would have suffered as a result of their suspension. I am satisfied that there is no alternative relief available to the applicant. It is not in dispute that the 15 employees are shopstewards of POPCRU. In my view, the requirement of consultation will include a case where a shopsteward is to be suspended.

[40] Applicant has proved the requirements to justify the relief prayed for in their notice of motion. The glaring unfairness in the manner in which the suspensions were effected warrants that the suspensions be reversed without delay.

Order

[41] In the light of the above analysis, I make the following order:

(i) The suspension of the 15 employees is hereby set aside.

(ii) The employees should return to work with immediate effect.

(iii) There is no order as to costs.

Nyathela AJ

Date of Hearing : 22 June 2009

Date of Judgment : 30 June 2009

Appearances

For the Applicant : Adv. J.L Basson

Instructed by: Grosskopf Attorneys

For the Respondent: Adv. L. Moloisane

Instructed by: State Attorney