IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 2242-10

In the matter between

SAMWU obo MONICA MATHABELA **Applicant**

and

DR J. S MOROKA LOCAL MUNICIPALITY **Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. On 10 November 2010, I handed down an order in the above matter which was brought before me on an urgent basis. The order is set out in paragraph 2 below.

2. Having considered the matter and heard the representations of the parties, the following order

is granted:

2.1. The Rules of the Court relating to the form and manner of service are dispensed with and the matter is dealt with as one of urgency.

2.2. The respondent is bound by the terms of the individual applicant's contract of employment and by the applicable terms of the Disciplinary Procedure and Code of the South African Local Government Bargaining Council.

2.3. The respondent is interdicted from proceeding with the disciplinary enquiry into charges of misconduct issued by the respondent on 30 September 2010 until such time as it complies with the provisions of Clause 6.6 of the Disciplinary Code and Procedure annexed as Annexure "B" to the founding affidavit of the applicant.

2.4. The respondent is ordered to lift the precautionary suspension of the individual applicant, until such time and in the event that the respondent reinstitutes a precautionary suspension in compliance with the provisions of clause 14 of the individual applicant's contract of employment.

2.5. No order is made as to costs

3. At the time of handing down judgment I undertook to file reasons for the order. My brief reasons for the order are set out below:

Urgency

4. The application was filed on 5 November 2010. At that stage the applicant was already on a precautionary suspension dating from month's earlier. The applicant was notified of the

enquiry on 30 September 2010, which was due to commence on 12 October 2010. At the enquiry the applicant's trade union representative raised objections to the appearance of advocates as a representative of the employer and chairperson of the enquiry respectively. The representative also challenged the applicant's continued suspension after the 60 day period had expired. The chairperson dismissed the objections to the composition of the enquiry and purported to extend the applicant's suspension.

5. The respondent argued that the urgency was self created because the applicant knew when she received the notice of the enquiry who would be chairing the enquiry and representing the employer and could have launched an application then or soon thereafter. The applicant's representative contends that she did the appropriate thing by first raising her objections at the opening of the enquiry. It appears that the enquiry was only due to resume on 10 and 11 November 2010. The applicant's attorney wrote to the respondent on 2 November 2010 reiterating the objections raised by the applicant's union representative and asked for the findings of the chairperson so that she could approach the court to have the enquiry set aside. The respondent was asked not to proceed with the enquiry but pending the matter being considered by this court. On 4 November 2010, the respondent replied confirming the rulings of the chairperson on the issues raised and that it intended to proceed with the enquiry on the dates mentioned.

6. It is true the applicant might have brought the application earlier than 5 November 2010, but it did approach the respondent more than a week in advance of the next scheduled date of the hearing requesting it not to proceed. In my view, it was the respondent's insistence on proceeding as planned without considering even a postponement of a week or two which left the applicant with no alternative but to approach the court on an urgent basis. The applicant is not blameless in this regard, but it also did not wait until the last minute to seek a postponement of the enquiry. Accordingly, I am satisfied that the matter was sufficiently urgent, and given the crispness of the issues and the lack of factual complexity, the respondent was not unduly prejudiced by having to respond within a shorter time frame to the application.

Infringement of rights

7. The applicant does not rely on a right to fair suspension, which can be dealt with by the CCMA in terms of section 185(2)(b) of the LRA, but relies on various contractual provisions governing her suspension and the disciplinary enquiry convened by the respondent. As such the claim is essentially that the respondent has acted unlawfully in one or more respects and the applicant is effectively seeking an order to enforce the relevant contractual obligations which she claims have been breached.

8. Clause 14 of the applicant's letter of appointment provides for precautionary suspension under certain conditions. Clause 14.3 stipulates that the employer must hold a disciplinary enquiry within 60 days of the suspension, provided that the chairperson of the hearing may extend such period, failing which the suspension terminates and the employee returns to full duty.

9. The applicant was suspended on 23 July 2010 and the enquiry commenced within 60 days thereof, but it was only on 12 October 2010 that the employer asked the chairperson of the enquiry to extend the suspension which he did. Accordingly, the suspension period of 60 days had expired by the time the chairperson made this ruling and he could not have been acting in terms of the powers given him under clause 14.3. It seems that the proper procedure would have been for the employer to take steps to institute a further precautionary suspension in compliance with clauses 14.1 and 14.2 of the applicant's letter of appointment.

10. The applicant also complained that her enquiry was not properly constituted in the following respects:

    10.1.the chairperson of the enquiry is an advocate , and

10.2.the employer was also represented by an advocate.

11. The chairperson ruled against an objection to his appointment on the basis that the applicant was not covered by the collective agreement which contains provisions governing the status of representatives and chairpersons of disciplinary enquiries. The applicant conceded that the relevant collective agreement excluded municipal managers from its ambit, but pointed out that her contract of employment incorporated the code and procedures of the bargaining council in terms of clause 15.4 of her contract which states, *inter alia*:

> "*The employer shall comply with its disciplinary code and procedures and, if there are none, with the disciplinary code and procedures of the South African Local Government Bargaining Council as well as with the Labour Relations Act, 66 of 1995.*"

12. In the absence of a code and procedure of its own, the respondent was then bound by the code and procedure set out in the bargaining council's collective agreement. Clause 6.6.4 of the procedure stipulates effectively that the employer's representative in a disciplinary enquiry had to be a more senior employee than the employee charged, and should be from within the department or from any other department of that municipality, or another municipality, or a full time SALGA official, or a full time employee of provincial or national government, but not an employee of the judiciary. Clearly such a definition does not include an independent practicing advocate and therefore would exclude the existing appointed representative of the respondent. Similarly clause 6.6.2 of the same agreement precludes an independent advocate chairing the enquiry.

13. It was suggested by the respondent that the dispute was one that concerned an interpretation or application of a collective agreement, but I do not think that is strictly correct. It involved an interpretation of a contract of employment in which a collective agreement was incorporated. Accordingly, it was not necessary for the applicant to have approached the CCMA, assuming for the sake of argument that she could not have approached this court an urgent basis if the matter solely concerned the interpretation and application of a collective agreement.

14. It seems clear than that the composition of the disciplinary enquiry to which the applicant was subject was irregularly constituted and as it was in breach of a procedure incorporated in her contract of employment was unlawfully constituted.

15. In the circumstances, I am satisfied that the applicant established that her rights not to remain on suspension and to appear before a properly constituted enquiry were violated.

Alternative remedies

16. The rights infringed are not ones that sound in money, nor are they convertible to monetary terms. They are process rights which can only be properly exercised if they are complied with. It is true that an employee may claim compensation for procedural unfairness, but in this instance the employee is not seeking relief for that wrong. I am satisfied that there is no real meaningful alternative available to the applicant except to demand compliance with her contractual entitlements.

Balance of convenience

17. Insofar as this issue needs to be addressed in what is really an application for final relief, I deal with it briefly as follows. It is true that the respondent is prejudiced by having to restart the disciplinary process, but it was challenged at the commencement of proceedings about the composition of the hearing. Insofar as the suspension goes, it is not precluded from revisiting that question, save only that it cannot be done under the provisions of clause 14.3 of the employee's contract, for the time being. On the other hand, because the rights the employee asserts are process rights whose value cannot be effectively restored at a later date when the time for exercising them has passed, I believe the balance of convenience favours the applicant in this instance.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 9 November 2010

Date of judgment: 10 November 2010

Date of filing reasons: 15 December 2010

Appearances:

For the applicant: R Edmonds of Ruth Edmonds Attorneys

For the respondent: K Lengane instructed by Ndlhovu AJ Attorneys