IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO J 1010/10

In the matter between:

ZIXOLISILE FENI **APPLICANT**

and

PAN SOUTH AFRICAN LANGUAGE BOARD **RESPONDENT**

REASONS FOR JUDGMENT

VAN NIEKERK J

Introduction

[1] On 26 May 2010, I made an order to the effect that the applicant's suspension be set aside pending the determination of a dispute referred to the CCMA on 17 May 2010, and that the respondent pay the costs of the application. These are my reasons for that order.

Factual background

[2] The material facts are briefly the following. The applicant is employed by the respondent as its head of legal services. After the suspension of the respondent's CEO, a Mr. Swepu was appointed as the acting CEO. In a number of executive management meetings conducted under Swepu's management, the

applicant raised a number of issues which he considers to concern good corporate governance. For instance, during early 2010, the applicant reported that Swepu did not complete his degree at the University of the Western Cape. An investigation was conducted on behalf of the respondent, and staff members were advised by the respondent's chairperson, Prof Ngubane, that the allegation was unfounded. (Strictly, this is not true. A certificate from the University of the Western Cape that was filed in these proceedings indicated that while Swepu had completed the requirements for the degree of BIuris in 2003, the degree would be conferred only in September 2010). Soon after this incident, and after a restructuring of the respondent's management, a Mr. Nkosi was appointed as the acting head of corporate services, and the applicant was required to report to him. The restructuring had the effect that the applicant was removed as a member of the respondent's executive management. The applicant claims that this conduct constituted punishment for being a whistleblower. During April 2010, the applicant referred a grievance to Swepu and to the respondent's chairperson, referring *inter alia* to the prejudice that the restructuring had caused him. The respondent did not respond to the grievance within the time limits required.

[3] On 13 May 2010, Swepu addressed a letter to the applicant, advising him that he had been placed on suspension with immediate effect. The introduction to the letter reads as follows:

> " *Dear Adv. Feni*
>
> *SUSPENSION FROM DUTY*
>
> *In terms of Regulation 17(a) of the PanSALB Regulations, I have, as the Acting Chief Executive of the Board, and after having consulted with your immediate supervisor, taken a decision to investigate possible charges of misconduct against you. Because of the seriousness of the conduct under*

investigation, and its gravity, I am of the view that your continued presence in the workplace may be prejudicial to the investigation."

[4] The present application was filed five days later, on 18 May 2010. In essence, the applicant's claim is that his suspension is a ploy to punish him for the disclosures that he has made and the grievance that he lodged.

Relevant legal principles

[5] Section 158(1) (a) (i) empowers this court to grant urgent interim relief. The court has applied the test established by the High Court, and requires an applicant to establish a clear right (or a prima facie right open to some doubt), an apprehension of irreparable harm should the relief not be granted, the absence of any suitable alternate remedy, and that the balance of convenience favours the applicant. (See Landman and Van Niekerk *Labour Court Practice* (Juta & Co) at A18- 19, referring to *Spur Steak Ranches v Saddles Steak Ranch* 1996 (3(SA 706 (C)).

[6] The application of the Protected Disclosures Act aside, and in so far as the first requirement is concerned, it is now well –established that employers proposing to suspend employees are required to act fairly. More specifically, the employer must have a justifiable reason to believe that the employee has committed the misconduct alleged; secondly, there must be some objectively justifiable reason to deny the employee access to the workplace based on the integrity of the pending investigation or some other relevant factor; and thirdly, the employee must be granted an opportunity to state a case before the employer takes a final decision to suspend the employee. (See *Mogothele v Premier of the North West Province & another* (2009) 30 ILJ 605 (LC), and *SA Post Office v Jansen van Vuuren* (2008) 29 ILJ 2793 (LC)).

[7] In the present instance, it is not seriously disputed that the respondent complied with none of these requirements. The letter of suspension issued on 13 May 2010 makes no reference to the nature of the misconduct that is to the subject of the proposed investigation, and no reason is proffered as to why the applicant should be absent from the workplace pending that investigation. Further, it is not disputed that the applicant was not afforded a right to be heard before the letter of suspension was issued. Indeed, the only consultation that took place was between Swepu and the applicant's supervisor. I have no hesitation in concluding that the terms on which the applicant's suspension was effected manifestly failed to meet the relevant requirements of fairness. To the extent that the applicant relies on the protections conferred by the Protected Disclosures Act, I am satisfied that the applicant has made out a case for interim relief. The applicant has made a series of allegations of improper governance, particularly at the hands of Swepu, and these have been met in the respondent's answering affidavit only by a series of bald denials. In these circumstances, and given the temporal coincidence between the applicant's lodgment of a formal grievance and the issuing of the letter of suspension, I must accept the applicant's averments and therefore that he has established, for the purposes of these proceedings, on a prima facie basis, that his suspension constitutes an occupational detriment as defined in the Act.

[8] In regard to the remaining requirements applicable to an order of interim relief, this court has previously commented on the harm brought about by unsustainable decisions to suspend. In *SA Post Office judgment* (supra) Mohlahlehi J observed that a suspension has a detrimental impact on an affected employee and that it may prejudice his or her reputation, advancement job security and fulfillment. The applicant has referred a dispute to the CCMA claiming that his suspension constitutes an unfair labour practice. I fail to appreciate why, pending the outcome of that application, he is to be subjected to these detriments. Finally, it seems to me that the balance of convenience obviously lies in the applicant's favour; the prejudice that the applicant will suffer

consequent on a refusal to grant the order sought outweighs any prejudice to the respondent. In any event, the effect of the order that I granted is that the respondent will be required to reinstate the applicant, without prejudice to its right to effect a lawful suspension, should it so wish, and assuming that it has proper grounds upon which to do so.

[9] Finally, in relation to costs, I wish to refer to the statement by Mohlahlehi J in the *SA Post Office* judgment in which he noted that it was necessary for this court to send a message to employers that they should refrain from hastily resorting to suspending employees when they have no valid reasons for doing so. Despite that message, it appears that employers (especially those engaged in the public sector) continue to regard suspension as a convenient mechanism to marginalise employees who for some reason have fallen from favour, and who effect suspensions without any consideration of the applicable requirements. The respondent's failure to deal with this matter with even the remotest regard for the relevant legal principles dictates that costs should be awarded against the applicant. I am mindful of the fact that the taxpayer must ultimately foot the bill for what is nothing less than managerial ineptitude. Had the applicant sought a punitive costs order or an order for costs against Swepu in his personal capacity, I would have given serious consideration to such a submission.

[10] For the above reasons, I made the order reflected in paragraph [1] above.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application 25 May 2010
Date of reasons: 1 June 2010.

Appearances:

For the applicant: Adv MS Mphahlele, instructed by Mketsu Inc
For the respondent: Adv BS Tshauke, instructed by Ramulifho Inc.