IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J 930/09

In the matter between:

MOOKGO MARIA MATUBA **Applicant**

and

GREATER TAUNG LOCAL MUNICIPALITY **Respondent**

JUDGMENT

VAN NIEKERK J

[1] On 26 May 2009, the applicant filed an urgent application in which she sought inter alia a declaratory order to the effect that she had been unlawfully suspended by the respondent and that she be allowed to resume her duties. On 26 May 2009, the respondent filed an answering affidavit in which it recorded that the applicant was free to return to work at any time. On the basis of this statement, the applicant returned to work. The only outstanding issue was that of costs. On 28 May 2008, when the matter was called, Cele J made an order, by consent, that the application be postponed *sine die*, and that the matter be decided by a Judge in Chambers on the basis of heads of argument to be filed by the parties. The parties subsequently filed heads of argument, and the Registrar placed the file before me in Chambers for a ruling as contemplated by the order.

[2] The applicant is the municipal manager of the respondent. She claims that the respondent unlawfully suspended her, and seeks an order uplifting the suspension and allowing her to resume her duties.

[3] The facts giving rise to the application are not contentious. The applicant was employed as the municipal manager of the respondent in terms of a fixed term contract. Clause 14 of the contract provides that the respondent may suspend the applicant as a precautionary measure if the applicant is alleged to have committed an act of serious misconduct and the respondent believes that her continued presence at the workplace might jeopardize any investigation into the misconduct or the well being or safety of any person or municipal property. In these circumstances, the respondent is obliged to give the applicant an opportunity to make representations on why she should not be suspended. Further, the applicant is entitled to be notified, in writing, of the reasons for suspension simultaneously with or at least 24 hours after the suspension, and has the right to respond within 7 working days. The wording of clause 14 is drawn from the relevant statutory protection afforded employees in the applicant's position. Also at issue in these proceedings is clause 13.5 of the applicant's contract. That clause provides:

> *"The Employer may grant the Employee special leave with or without pay for a reasonable number of working days with prior approval in terms of the relevant special leave policy of the Municipality."*

[4] In February 2009, the applicant raised concerns about councillors interfering with the administration of the respondent. It appears that during the same month, the council resolved to suspend the applicant, but for reasons that are not entirely apparent, did not proceed to implement the

suspension. On 6 April 2009 the applicant wrote to the MEC for local government complaining of interference by councillors. The applicant was again suspended, this time on the basis of allegations of corruption. After the applicant threatened legal action, the suspension was uplifted. On 14 May 2009, the council held a special meeting and passed a resolution. The resolution provided that the applicant's suspension be uplifted with immediate effect, and that an internal investigation be conducted. For present purposes, paragraphs (g) and (h) of the resolution are significant. These provide:

> *"(g) That since the allegations affect her work, the Municipal Manager be put on special leave for 14 days with pay whilst the investigation is on.*
> *(h) That upon arrival at work, the municipal manager be served with an intention for suspension and further be afforded the opportunity to make presentation within seven (7) days from the day she receives a notice of suspension"* (sic).

The resolution was not unanimously adopted. A significant number of councillors recommended that the applicant should not be placed on special leave but that she be allowed to report for duty and a letter notifying her of an intention to suspend be served, and that depending on any representation received form the applicant, the council would decide whether "to charge her or not."

[5] On 19 May 2009, the applicant presented herself for work and was handed a letter signed by the mayor on the 18th. The relevant part of the letter reads:

> "*Council is also of the view that your continued presence at work will jeopardise its investigations and grants you forthwith a special*

leave with pay of 14 days whilst investigations are continuing. This is done in line with clause 13.5 of your employment contract.

By copy hereof, you are invited to make written representations within seven (7) days from today 18th May 2009, why you should not be suspended."

[6] On 20 May 2009, the applicant's attorney wrote to the respondent stating inter alia that placing the applicant on special leave was "merely a suspension in another guise", and that an urgent application would be brought to uplift the suspension. The respondent did not reply to the letter. On 26 May 2009, the applicant filed this application, seeking the relief referred to in paragraph [1] of this judgment.

[7] I turn now to the issue before me. The court has a wide discretion to make orders for costs. Section 162 of the Act requires that orders for costs are made according to the requirements of the law and fairness. In *NUM v East Rand Gold And Uranium Ltd* 1992 (1) SA 700 (A), the court listed a number of factors that might appropriately be taken into account, including the general rule that absent special circumstances, costs follow the result. In so far as the merits of the applicant's claim are concerned, I deal first with the applicant's suspension. The respondent contends that the resolution is nothing more than an application of clauses 13.5 and 14 of the applicant's contract of employment. In other words, the effect of the resolution was to give notice of the respondent's intention to suspend the applicant in future, pending her written representations, but to grant her 14 days' special leave, on full pay, in the interim. In my view, there is no merit in this contention. Although no evidence has been placed before the court to indicate what the terms of the respondent's policy on special leave might be, it is clear from the wording of clause 13.5 of the applicant's employment contract that special leave is leave sought at the initiative of the employee, and granted by the employer on that basis. The stipulation

that special leave may be granted with prior approval indicates that it is not leave that may be unilaterally imposed. In particular, clause 14 does not contemplate that special may constitute a basis on which to enforce an employee's absence from work solely at the employer's behest for reasons related to allegations of misconduct. In the present circumstances, the special leave has its genesis in the council's resolution that the applicant "be put on a special leave". The wording of the resolution is clearly peremptory, and does not contemplate an offer that the applicant was free to reject. To permit an employer unilaterally to enforce special leave in circumstances where allegations of misconduct are under investigation is to permit the employer to avoid the protections afforded the employee by clause 14, which as I have indicated, are protections that have a statutory origin.

[8] To the extent that there is a dispute of fact on the papers as to whether the applicant acquiesced and of her own volition accepted the special leave referred to in the respondent's letter dated 19 May 2009, the respondent's contention that the applicant was "merely given the choice not to come to work" is untenable given the content of her attorney's letter dated 20 May 2009, and the fact that the content of this letter, and in particular, the averment that the applicant did not consent to the special leave, was never contested, nor was it stated that she had acquiesced in the leave. The first indication of any averment that the special leave was voluntary appears in the answering affidavit, along with the respondent's statement to the effect that the applicant was free to return to work.

[9] In relation to urgency, the loss suffered by an applicant in circumstances such as the present is often non-pecuniary (see *Muller v House of Representatives* (1991) 12 ILJ 761 (C). This court has previously come to the assistance of suspended employees by granting urgent relief on the basis that the hardship suffered outweighs any prejudice to a respondent.

In my view, the applicant was entitled to approach this court on an urgent basis.

[10] Finally, I fail to appreciate why the respondent failed to place its version on record in response to the applicant's attorney's letter of 20 May. Had the respondent done so, and placed on record its version that the applicant had not been suspended and that she was free to return to work, this application would not have been necessary. Instead, the respondent's silence resulted in the applicant being obliged to protect her rights.

[11] In short, the respondent was not unilaterally entitled to place the applicant on special leave and thus circumvent the protections afforded the applicant by clause 14 of her contract of employment. Placing the applicant on special leave in these circumstances amounted to her unlawful suspension. The applicant made out a case for urgent relief. The respondent could have avoided the necessity of this litigation had it responded to the applicant's attorney's letter dated 20 May 2009, and had it made the tender then that appears in its answering affidavit. In these circumstances, considerations of law and fairness dictate that the respondent should be liable for the costs of this application.

I accordingly make the following order:

1. The respondent is to pay the costs of this application.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of Judgment: 14 August 2009

Appearances:

For the applicant: Mr. G Ray-Howett from Grant Ray-Howett Attorneys

For the respondent: Adv A J Swart
Instructed by: Kgomo Mokhetle & Tlou Attorneys