

SOUTH AFRICA / JUDGMENT

Lekabe v Minister Department of Justice And Constitutional Development (J1092/08) [2009] ZALCJHB 95 (5 February 2009) [2009] ZALCJHB 95

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J1092/08

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IN

THE LABOUR COURT OF SOUTH AFRICA

HELD

IN JOHANNESBURG

REPORTABLE

CASE

NO: J1092/08

In

the matter between:

GOSISEPHUTHABATHO

GUSTUV LEKABE

APPLICANT

and

THE

MINISTER DEPARTMENT OF JUSTICE

AND

CONSTITUTIONAL DEVELOPMENT

RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the Applicant prays for an order on the following terms:

“1. ...

2. Declaring that the period of suspension of the Applicant from his duties by the Respondent expired on or about the 24 May 2008.
3. Declaring that the provisions of clause 2.7(2)(c) of the Senior Management Service Handbook relating to the holding of a disciplinary hearing before the expiry of 60 days from the date of the Applicant's suspension were peremptory.
4. Declaring that the right of the Respondent to hold a disciplinary hearing in terms of clause 2.7(2) of the SMS Handbook terminated with the expiry of the 60 days mentioned in paragraph 3 above.
5. Interdicting the Respondent from proceeding with the disciplinary action against the Applicant on the basis of the charges which are hereto attached and marked "A".
6. Declaring that the suspension of the Applicant from his employment as the State Attorney for Johannesburg was no longer valid.
7. Ordering the Respondent to permit the Applicant to resume his duties as the State Attorney for Johannesburg within 5 days from the date of this order.”

[2] In essence the Applicant's case is that his suspension terminated when the period laid down in clause 2.7(2) of Chapter 7 of the Senior Management Service Handbook ("the SMS Handbook") expired. He further contends that the Respondent's prerogative to subject him to a disciplinary hearing also terminated with the expiry of the aforesaid period, and that he was entitled to resume his duties as the State Attorney in light of the expiring of the suspension period.

Background**facts**

[3] The Applicant received the letter suspending him from his duties from Mr Menzi Simelane, the Director-General for the Department of Justice and Constitutional Development on 25th March 2008. The reason for the suspension was:

“Serious allegations of, inter alia, corruption and sexual harassment have been made against yourself. The allegations, amongst other, relate to soliciting and / or accepting bribes or other improper inducement from service providers. It has also come to the Department's

attention that you have been found guilty by the Law Society of the Northern Provinces for serious professional misconduct and a decision has been made to request you to show cause why your name should not be struck off the roll of practicing attorneys.

In view of the seriousness of the allegations against you, and the fact that your presence within the office may jeopardize any investigation into the allegations, the Department has decided to suspend you in terms of clause 2.7 (2)(a) of Chapter 7 of the Senior Management Services Handbook.

You are hereby given the opportunity in terms of the rules of Administrative Justice to comment on the abovementioned. Your written representations or a written indication that you do not wish to submit any, must please be handed to Adv L Vilakazi, Chief Litigation Officer within 48 hours of receipt hereof, where after your suspension will be reconsidered. Should you fail to reply within the stipulated period it will be deemed that you do not wish to submit representations.”

[4] After some communication through correspondence between the parties' attorneys, the Applicant was served with a letter on the 12th June 2008, notifying him to attend a disciplinary hearing on the 20th June 2008. The Applicant contends that in terms of clause 2.7 (2) of Chapter 7 of the Code he should have been charged with misconduct

within 60 (sixty) days of his suspension, failure to do so amounted to a waiver of the right to discipline him by the Respondent.

[5] Thus the issue for determination in this matter concerns the interpretation of clause 2.7 (2) of the SMS Handbook and specifically whether:

- the provisions of clause 2.7 (2) are peremptory.
- the suspension has become unlawful as a result of the expiring of the 60 (sixty) days.
- an employer has the right to continue with the disciplinary hearing after the 60 (sixty) days has lapsed.

[6] For the purposes of this judgment I do not deem it necessary to go into details of the charges proffered against the Applicant.

[7] In his submission that the Respondent was no longer entitled to proceed with the disciplinary hearing because of the lapse of 60 (sixty) days since his suspension, the Applicant relied on the decisions, *Minister of Labour v General Public Service Sectoral Bargaining Council & Others* [2006] 27 ILJ 2650 (LC) par 12 & 13 and *Lovejoy Mlambo & Another v Head of Department: North West Department of Agriculture, Conservation and Environment & Another* unreported case number CA1202/06.

- [8] In the Lovejoy Malambo the Buphutatswana Provincial Division in an urgent application concerning the suspension of the employees over a period of 368 (three hundred and sixty eight) days, held per Landman J that:

“[22] The applicants have not waived their right to rely on clause 2.7 (2)(c) of the Handbook. They accordingly have the right not to be subjected to a disciplinary hearing...”

The Court went further and prohibited the employer from taking disciplinary action against the two employees. The suspension which

had exceeded the 60 (sixty) days in terms of clause 2.7 was declared invalid.

- [9] The case of the Minister of Labour (*supra*) is distinguishable from the present case in that in that case the Court was dealing with the unfair labour practice. The unfair labour practice issue which the arbitrator had to deal with before the matter came before this Court on review concerned the provisions of clause 7.2(c) of Resolution 1 of 2003 of the Public Service Coordinating Bargaining Council (the PSCBC) which reads effectively the same way as clause 2.7(2) of the SMS Handbook. Clause 7.2

- (c) reads as follows:

“If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.”

- [10] In that case, the Minister of Labour, the Court confirmed on review the finding of the arbitrator that employer in charging the employee after the expiry of the 60 (sixty) days committed an unfair labour practice.

- [11] In *LLOYED v CCMA and Another* (2005) 26 ILJ 1039 (E), the Court found that the time frame for bringing disciplinary hearing against the employee as set out clause 7.1 and 7.4 of Resolution 1 of 2001 to be peremptory and binding. In that case the delay in instituting the disciplinary hearing against the employee for the first offence was 32 (thirty two) months after the occurrence of the offence, a delay of 22 (twenty two) months after the second offence and a delay of 18 (eighteen) months after the investigation. The court further found that on the face of it the delay was excessive and in the absence of good cause unreasonable.

- [12] In my view the above approach is incorrect. I specifically, with due respect do not agree with the decision in *Lovejoy Malambo* and believe that the decision was made in error. In dealing with the broader principle of the consequences of failure by an employer to comply with the provisions of a disciplinary code, this Court in *National Union Of Mineworkers v FOSKOR* unreported case number JR 888/05, held that the correct approach to adopt was that enunciated in *Highveld District Council v CCMA and Others*

- (2002) 12 BLLR 1158 (LAC). See also *Khula Enterprise Finance Limited v Madinane and others* (2004) 4 BLLR 366 (LC) and *SA Tourism Board v CCMA and Others* (2004) 3 BLLR 272 (LC).

[13] In Highveld District Council, the Labour Appeal Court held that:

“Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in Section 188 (1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair....When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair.”

[14] The above approach is similar to that adopted in the case of Leonard Dingler (PTY) Ltd v Ngwenya (1999) 5 BLLR 431 (LAC), where Judge Kroon JA stated:

“In my judgement, and having regard to all circumstances, the time when and the manner in which the apparent hearing was held, while not strictly in accordance with the appellants disciplinary code, were substantially fair, reasonable and equitable.”

See also SA Tourism Board v CCMA And Others [2004] 3 BLLR 272 (LC).

[15] The decision of the Supreme Court of Appeal (SCA) in Denel (PTY) Ltd v D.P.G Voster 2004 (4) SA 481 (SCA), on the face of it supports the approach in Lovejoy Malambo. However on a proper analysis the decision is distinguishable from that of Leonard Dingler and Lovejoy Malambo. In Denel the SCA was dealing with a situation where the disciplinary code was incorporated into the contract of employment of each of the employees. In this regard the Court held in dismissing the contention of the appellant that it was not correct that the only thing required of the parties was that they act fairly towards one another, despite the contractual obligation requiring something more. The other important point to note in Denel is that the matter came before the SCA on appeal from the Pretoria High Court where the Court was faced with having to decide on damages for breach of contract of employment and damages for injuria. The claim for injuria was dismissed and the court confined itself to damages for breach of contract.

[16] Turning to the specific issue in the present instance, in my view it could never have been the intention of the parties that clause 2.7(2)(c) of the SMS Handbook should take away the right of an employer to discipline an employee on the expiry of the 60 (sixty) days from the date of suspension. In essence the case of the Applicant in the present instance is that the right of the Respondent to proceed with the disciplinary hearing prescribed on the on the expiry of the 60 (sixty) days from the date of his suspension.

- [17] In my view clause 2.7(2)(c) deals with suspension and not the disciplinary action. There is nothing in this clause that says an employer would lose the right to discipline an employee on the expiry of the 60 (sixty) days from the date of the suspension. I have not been able to find even a basis for implying the interpretation sought by the Applicant or the one given by the Court in *Lavejoy Malambo*. At best, as I see it, the suspension falls away after the 60 (sixty) days unless the chairperson of the disciplinary hearing extends that period.
- [18] The purpose of clause 2.7(2)(c), as I see it, is to address the problem of protracted suspensions which demoralizes and unfairly prejudice the suspended employee. It would appear that the mischief which the parties sought to address with the provisions of clause 7.2 was to deal with what Andre Van Niekerk J in *Mosweu Paul Magotlhe v The Member of the Executive Council for Agriculture Conservation and the Environmental and Another* soon to be reported case number J2622/08, regarded as the tendency by certain employers to:
- “... regard suspicion as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worst still, to view suspicion as a convenient mechanism to marginalise an employee who has fallen from the favour.”*
- [19] Thus the right of the employee in the event that the employer does not uplift the suspension on the expiry of the 60 (sixty) days is to file an unfair labour practice claim or bring an application to have an order directing the employer to uplift the suspension. I need to emphasize that in my view it could never have been the intention of parties that the right to discipline by an employer would fall away on the expiring of the 60 (sixty) days.
- [20] The Court in *Magotlhe’s* case quoted with approval what this Court had said in *SAPO Ltd v Jansen van Vuuren* [2008] ZALC 33; [2008] 8 BLLR 798 (LC). The Court in that case was dealing with the abuse of power by the employers through the use of suspensions. As stated earlier the real intention of the parties in promulgating clause 2.7(2)(c) of the SMS Handbook was to address this abuse. The intention was to curb the power of employers in the public service from using protracted suspension as a means of marginalising those employees who may have fallen out of favour. The intention of the parties was also to minimise if not do away with the resultant detrimental impact, the prejudice on the affected employees, reputation, advancement, job security and fulfilment that would arise from the prolonged suspension. See in this regard *SAPO* (supra) (at paragraph 37).
- [21] In the circumstance the Applicant’s application stands to be dismissed in as far as interdicting the disciplinary hearing. The sixty days having expired and the employer having not taken any further steps in the initiation of the disciplinary hearing, I see no reason why the Respondent should not be ordered to uplift the suspension and allow the Applicant to resume his duties. The Respondent should by now have completed its investigations and therefore I do not see on what basis the suspension should be prolonged further.

[22] In as far as costs are concerned, in my view both law and fairness do not require that costs be ordered.

[23] In the premises I make the following order:

(i) The Applicant's application to interdict the Respondent from proceeding with the disciplinary hearing is dismissed.

(ii) The period of suspension of the Applicant from his duties have expired and accordingly the suspension beyond the 60 (sixty) days is invalid.

(iii) The Respondent is to permit the Applicant to resume his duties as the State Attorney for Johannesburg within 5 days from the date of this order.

(iv) There is no order as to costs.

Molahlehi J

Date of Hearing : 23rd October 2008

Date of Judgment : 5th February 2009

Appearances

For the Applicant : Adv M Khoza SC with Adv A N Nxumalo

Instructed by : N F Masenamela Incorporated

For the Respondent: Adv B R Tokota SC with Adv T A N Makhubele

Instructed by : The State Attorney (Pretoria)

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