

SOUTH AFRICA / JUDGMENT

Matona v Eskom Holdings SOC Ltd (J602/15) [2016] ZALCJHB 125 (27 March 2016) [2016] ZALCJHB 125

COURT

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

J602/15

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J602/15

In the matter between:

TSHEDISO MATONA Applicant and ESKOM HOLDINGS SOC LTD Respondent

Heard: 26 March 2015

Delivered: 27 March 2015

Ex Tempore Judgment

WHITCHER J

- [1] The Applicant, the Chief Executive of the Respondent, seeks urgent relief to uplift his suspension pending the outcome of an unfair labour practice dispute he has referred to the CCMA challenging the fairness of his suspension.
- [2] The Applicant must satisfy the requirements for urgent interim relief by showing:
 - (i) A prima facie right (although open to some doubt) to the final relief that will be sought in due course at the CCMA. This means the Applicant need only show that there is some merit in his claim that his suspension was unlawful and/or unfair. In other words he has prospects of success in his unfair labour practice claim at the CCMA.

(ii) An apprehension of irreparable harm, if the application is not granted;

(iii) That the balance of convenience favours him; and

(iv) The absence of any other satisfactory remedy.

[3] The Applicant's contract of employment stipulates that if the Company suspects that the Executive is guilty of the conduct which may, if proved, justify dismissal, or has committed a breach of any of the terms of this Agreement, it may, pending a duly constituted enquiry into the alleged conduct in question, suspend the executive on full pay for a reasonable period.

[4] The Applicant's contract also stipulates that his contract is subject to the rights that arise from the LRA. According to case law this means that the justifiability of a suspension invariably rests on the existence of a prima facie reason to believe the Applicant committed serious misconduct and before making a final decision to suspend, the employer must have afforded the Applicant a fair and reasonable opportunity to make representations as to why he should not be suspended, even if the suspension is on full pay. The Applicant has the right to be provided with relevant information to make meaningful representations. When dealing with a holding operation suspension as opposed to a suspension as a disciplinary sanction, the right to a hearing may legitimately be attenuated. That is so where the precautionary suspension is on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized and where the period of suspension is for a limited duration.

[5] Did the Board have a prima facie reason to believe that the applicant committed serious misconduct?

[6] It must be noted here that the Board at the time of the suspension is not expected to have existing concrete and conclusive proof that the Applicant committed acts of serious misconduct. The purpose of an enquiry is to ascertain whether their prima facie view is correct and whether there is sufficient evidence to institute disciplinary charges. The only requirement is that the Board must have a prima facie reason to believe that the Applicant committed serious misconduct? The Applicant must have done something which gave them reason to suspect such misconduct.

[7] The Board of Directors claimed in its answering affidavit that the Applicant and EXCO had provided unreliable and inconsistent

information to the War Room and the Board, they were not coming up with concrete plans and strategies to deal with Eskom's

problems, they were not dealing with Eskom's problems with the urgency they require, it appeared that they were not properly

managing the Philosophy Maintenance Programme and the prices for the Medupi and Kusile Projects seem to have significantly increased. On this basis the Board formed the view that there “may” have been wrongdoing or negligence on the part of the applicant and EXCO in performing their jobs and therefore resolved to conduct an independent enquiry.

[8] The Applicant suggested that the Board fabricated these reasons for the purposes of defending this application because the Board did not offer this explanation for its decision to suspend him before or at the time of his suspension. The Board also did not mention these reasons in his suspension letter.

[9] The reasons for his suspension contained in the notice are as follows:

“Due to the nature of this enquiry and the importance of it being free of any influence from leadership in the organization, pending the completion of the investigation into these matters you should be placed on suspension....in order for the investigation to proceed expeditiously as possible, it would not be appropriate for you to remain at work whilst such investigation is in place”.

[10] In my view, the timing of providing the reasons is not sufficient evidence to conclude that the Board fabricated the reasons. All this shows is that the Board was not forthcoming with the Applicant as to the real reasons for the enquiry and why they believed he should be suspended pending the outcome of the enquiry.

[11] Thus on the face of things the Board did have a prima facie reason to believe that the Applicant committed misconduct. But do these allegations amount to serious misconduct? In the context of the problems facing Eskom, they do.

[12] Was the Applicant afforded a fair opportunity to make representation on his suspension prior to the decision to suspend?

[13] As found earlier on, the Board was less than frank with the Applicant regarding the true nature of the enquiry and that the Applicant was in fact being investigated for possible misconduct in respect of specific issues. The significance and implication of this is that, as submitted by the Applicant, he was not provided with relevant information to make meaningful representations as to why he should not be suspended. It is also clear from the timing and sequence of events on 11 March that he was not afforded reasonable time to make representations as to why he should not be suspended. On 11 March 2015 the Chairperson of the Board informed the Applicant that the Board had resolved to institute the independent enquiry and he asked the Applicant to recuse himself as the Chief Executive so as not to influence the enquiry, which he indicated would last 3 months. According to the Applicant the discussion that ensued centred on whether there was a need for such an enquiry in light of the existence of the “War Room” whose task, in the Applicant’s view was to enquire into the affairs of the Respondent. The Applicant was asked to leave the room and when he was called back after 30 minutes he was handed a notice of suspension.

- [14] The sequence of events and timing of the suspension notice strongly suggests that the Board had made up its mind to suspend the Applicant irrespective of his representations.
- [15] Was it necessary to suspend the applicant pending the enquiry?
- [16] The next issue is whether, despite the Board's view that the Applicant may have been involved in wrongdoing, it was necessary to suspend him and prevent him from working. According to the Respondent's policy, the decision to suspend an employee must be considered if and when one of the following factors is involved: (i) an element of dishonesty in the alleged misconduct; (ii) possibility of tampering with evidence; (iii) possibility of interfering with the investigation process; (iv) the possibility of intimidating witnesses.
- [17] Clearly, the only way for the Board to arrive at an informed decision in this regard is if they had some information about the Applicant to make them believe he may act in one of the ways set out above and after giving him an opportunity to make representation on these matters. This was not done and the Board has provided no material to show that they had good reason to believe that the Applicant was likely to interfere with or intimidate witness or to tamper and interfere with the investigation. The Board indicated that they would be relying on other officials to provide the relevant information during the investigation.
- [18] In all these circumstances, there is prima facie evidence that the suspension of the Applicant was unfair.
- [19] The Applicant has thus established a prima facie right to the final relief that will be sought in due course at the CCMA.
- [20] Considering the dispute of fact surrounding the circumstances of the suspension I was not in a position to find that the Applicant established a clear right, and in these circumstances the further requirements for urgency become relevant. The Applicant must therefore show irreparable harm, lack of an alternative remedy and that the balance of convenience favours granting the order.
- [21] The Applicant contends that given his senior status the suspension harms his dignity, his reputation and his right to work. He also submits that his continued suspension will cause irreparable harm to the operations of the Respondent and the economy. The Applicant contends that the balance of convenience favours granting the interdict because there are no serious charges pending against him and there is no reason for him to interfere with the investigation and enquiry.
- [22] I agree with the submissions of the Respondent that the Applicant has not established irreparable harm and the absence of appropriate alternative remedies.

[23] The Applicant acknowledged the availability of the CCMA remedy, for he is exploiting that mechanism, as he should. Arbitration

proceedings at the CCMA are the ideal forum – and the process and forum selected by the legislature – to deal with the factual issues in dispute in relation to suspension and to assess its fairness in a careful and considered manner. What the Applicant has to show is why that alternative remedy is not adequate. There is no indication by the Applicant that the CCMA process will take an unduly long time. On the contrary, it can reasonably be expected to be resolved in a relatively brief period of time. Moreover, the CCMA referral form makes provision for the Applicant to inform the CCMA of any special circumstances of his case. These could include representation for an expedited hearing on the basis that the matter is of public interest and it is in the public interest that the matter be expedited.

[24] In my view the Applicant did not establish the prospect of irreparable harm if he is not given relief by the Labour Court in the intervening period. The Applicant is still being provided with remuneration and his title has not been removed. The allegations

about damage to his reputation do not hold serious weight. Any perceived possible damage can properly be addressed through the CCMA process and the Respondent's investigation enquiry which the Respondent has undertaken to complete within three months.

[25] Most decisively is the fact that the news and speculation about his reputation is already in the public domain. Comments that impact on the Applicant's reputation have already occurred. An order uplifting the suspension will not solve or make these issues go away because the CCMA and proposed enquiry must still make the final determination on the matter. In other words, the vindication or otherwise of the Applicant is still an ongoing matter and has not been finally resolved.

[26] The balance of convenience does not favour forcing a working relationship between the Applicant and the Respondent until the CCMA has finally resolved the matter.

[27] In the circumstances the Order of this Court is as follows:

- (i) The application is struck from the roll.
- (ii) There is no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv A Redding SC

Instructed by: Cheadle Thompson and Haysom Inc

For the Respondent: Adv P Kennedy SC

Instructed by: Bowman Gilfillan

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