

SOUTH AFRICA / JUDGMENT

Mokoena v Merafong Municipality and Others (J1788/19) [2019] ZALCJHB 226; (2020) 41 ILJ 234 (LC) (13 September 2019) [2019] ZALCJHB 226

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J1788/19

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1788/19

In the matter between:

MORAKANE
MOKOENA
Applicant
and
MERAUFONG
MUNICIPALITY
First
Respondent
SPEAKER
OF THE MERAUFONG MUNICIPALITY
Second Respondent
THE EXECUTIVE MAYOR OF
THE
MERAUFONG
MUNICIPALITY Third
Respondent
Heard: 4 September 2019
Delivered: 13
September 2019

JUDGMENT**PRINSLOO, J****Introduction**

- [1] The Applicant approached this Court on an urgent basis essentially seeking an order to reverse her suspension and to interdict the First Respondent (the Municipality) from taking any disciplinary steps against her. I will fully deal with the relief that the Applicant seeks *infra*.
- [2] The application is opposed by the Respondents who took issue with urgency. I do not intend to deal with the issue of urgency in any detail as this Court has a discretion and I am inclined to deal with the matter urgently, notwithstanding the objections raised by the Respondents.

Background

- [3] The Applicant was employed by the Municipality as Municipal Manager on 1 November 2017 and she still holds that position. On 29 July 2019, the Applicant was issued with a notice of intention to suspend. In the said notice, certain allegations were made against the Applicant *inter alia*, relating to her failure to include the 'Handover Report' and the 'Credit Control Plan' as part of the discussions during the strategic session held in December 2017 and the non-implementation of the 'Credit Control Plan' and the 'Financial Turn Around Priority Plan'.
- [4] The Applicant was informed that the allegations of misconduct against her were of a serious nature, that she occupies a senior position, that she could potentially influence employees and that her presence at the workplace may jeopardize further investigations into the allegations of misconduct. The Municipality afforded the Applicant an opportunity to make written submissions as to why she should not be suspended in accordance with Regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers (the Regulations).
- [5] On 5 August 2019, the Applicant made submissions regarding her intended suspension. The Applicant submitted that the allegations levelled against her do not constitute acts of misconduct, but rather acts of sub-standard performance and that Regulation 6 does not contemplate precautionary suspension in the case of sub-standard performance, wherefore her suspension would be unlawful and in breach of the Regulations.
- [6] On 12 August 2019, the Municipality's council resolved that the Applicant be suspended and on the same day the Executive Mayor issued a letter of suspension to the Applicant. She was suspended with immediate effect and with full pay and benefits.

[7] On 15 August 2019, the Applicant's attorneys addressed a letter of demand to the Municipality, stating that the Applicant's suspension was unlawful for want of compliance with the Regulations in that there were no acts of misconduct alleged, but rather poor performance, that precautionary suspension is not applicable in the event of poor performance and that no further process may take place until the prescribed performance management procedures are complied with. The Applicant insisted that she be placed on a performance management programme and only if that had been done, a performance hearing may be held. The Applicant demanded inter alia, that her suspension be uplifted and that the allegations set out in the notice of intention to suspend be dealt with as poor performance

rather than misconduct.

[8] When the Applicant did not receive a response to the aforesaid letter by 20 August 2019, this urgent application was filed on 21 August 2019.

The relief sought

[9] The Applicant seeks the following relief on an urgent basis:

- '1. Ordering that the allegations made against the Applicant in the letters of intended suspension as well as the notice of suspension dated 29 July and 12 August 2018 respectively be treated by the First Respondent, the Second respondent (where relevant) and Third Respondent, as allegations pertaining to alleged poor performance due to incapacity;
2. That the Applicant's suspension is declared unlawful and that her suspension is reviewed and set aside;
3. That the First Respondent be ordered to permit the Applicant to return to her position as Municipal Manager;
4. To the extent that it has not taken place, interdicting the Municipality from taking further steps which are pursuant or related to the procedures provided for dealing with alleged misconduct in the Regulations, including the appointment of an investigator, the investigation being conducted by the investigator, and the adoption of any report tabled at Council by the investigator;
5. To the extent that it has already taken place, declaring unlawful, reviewing and setting aside any steps taken by the Municipality, subsequent to the Applicant's suspension, which are pursuant or related to the procedures provided for dealing with alleged misconduct in the Regulations, including the appointment of an investigator, the investigation conducted by the investigator, and the adoption of any report tabled at Council by the investigator;
6. Ordering that should the Respondents wish to persist with addressing the allegations, they do so pursuant to the procedures provided for to deal with alleged poor performance due to incapacity, as provided for in the Regulations.'

[10] The relief that the Applicant seeks is premised on the notion that she should not be charged with misconduct, but rather that the

allegations levelled against her be treated as poor work performance and that any process that may be followed, be treated as a poor work performance process instead of a disciplinary process. In my view, the Applicant has to succeed with the relief sought in prayer 2 of the notice of motion, namely that the Respondent be ordered to treat the allegations made against her in the letter of intention to suspension as well as the notice of suspension, as allegations pertaining to alleged poor performance due to incapacity, to succeed with any of the remaining relief set out in prayers 3 – 7 of the notice of motion.

[11] The point of departure should be the relief sought in prayer 2 of the notice of motion.

[12] The obvious question that leaps out is whether this Court can order the Respondents to treat the allegations against the Applicant as poor work performance instead of misconduct.

Analysis

[13] The Respondents raised a point in limine in respect of jurisdiction and submitted that this Court has no jurisdiction to adjudicate this dispute at this stage as the dispute is essentially an unfair labour practice dispute where the Applicant alleges that the Respondents are not entitled to suspend her as a precautionary measure since her alleged conduct is based on poor work performance. The unfairness of a suspension is to be adjudicated by way of arbitration proceedings.

[14] The point in limine is without merit as the application before this Court is not one relating to an unfair labour practice and the Applicant is not challenging the fairness of her suspension.

[15] In my view the issue is this: The Applicant's sole complaint in respect of her precautionary suspension is that, according to her, the conduct complained about is not misconduct but sub-standard or poor work performance and the Regulations do not provide for precautionary suspension in the event of poor work performance. As her conduct relates to poor work performance, the Respondents are to follow the procedure for dealing with sub-standard performance, as provided for in Chapter 3 of the Regulations and they should not follow a disciplinary process.

[16] The Applicant does not dispute that the Regulations provide for precautionary suspension in the event that it is alleged that a senior manager has committed an act of misconduct.

- [17] In her founding affidavit, the Applicant addressed each of the allegations levelled against her in the letter of intention to suspend and her suspension letter and provided a detailed response to each allegation, even attaching documents in support of her explanation. The Applicant's case is that the allegations levelled against her are not of a misconduct nature wherefore misconduct procedures and precautionary suspension are not applicable and that she has the right to allegations of poor performance being dealt with as such.
- [18] In short, the Applicant's case is that if the matter proceeds as one of misconduct, there would be a misdiagnosis.
- [19] On the other hand, the Respondents' case is that they have made it clear that at this stage they regard the Applicant's conduct as misconduct. The investigation into the Applicant's conduct is not yet finalised and therefore it is premature for the Applicant to allege that the conduct complained of is in fact that of poor work performance instead of misconduct.
- [20] The Respondents submitted that the Applicant has made herself guilty of dereliction of duty and that there is compelling evidence of a prima facie case of serious misconduct against her. The Respondents made averments in the answering affidavit in support of their contention that the Applicant derelicted her duties and so forth, conduct constituting misconduct.
- [21] It is evident that the Applicant addressed the allegations levelled against her and in answer, the Respondents made averments to support their position in respect of misconduct. This is clearly done to illustrate to this Court from the Applicant's perspective, that her conduct is poor performance and from the Respondents' perspective, that it is misconduct.
- [22] At this point the allegations against the Applicant are the subject of an ongoing and incomplete investigation process and not only is this Court not competent to express any view on the merit or otherwise of these allegations based on what is contained in the affidavits, it would also be improper to do so. The parties want this Court to consider, assess and evaluate the allegations, their responses and submissions and to make a finding as to whether those are allegations of poor work performance or misconduct, which would determine whether an incapacity or disciplinary process is to follow.
- [23] As important as a proper categorization of a dispute is, it is not the function of this Court to categorize the dispute at this stage. This Court is not the forum to determine or decide the character or classification of allegations levelled by an employer against its employee or to dictate the process to be followed, more so where an employer has elected to deal with the allegations as misconduct. If the employer's decision or election is later shown to be wrong, it would face the music at an appropriate time.

[24] It is trite and has been accepted by this Court that an employer has the right to discipline its employees, of course in a lawful and fair manner. In fact, the disciplining of employees is the duty and the prerogative of the employer and an employer remains dominis litis in deciding whether an employee is to be charged with misconduct and if so, what the nature of the charges would be.

[25] In the event of a dismissal, the employer is bound by the election it has made, as was confirmed in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[1] where the Labour Appeal Court (LAC) held that:

‘It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.’

[26] Having said that, the Municipality, as an employer, is entitled to invoke the provisions of the Regulations and to suspend senior managers on a precautionary basis, if it is alleged that the senior manager has committed an act of misconduct and where the other requirements in the Regulations have been met.

[27] In casu, the Applicant is not attacking the fact that the Municipality may suspend her on allegations of misconduct, but she is attacking the Municipality’s prerogative to decide whether it wants to follow a disciplinary route or a poor work performance process.

[28] The Applicant has to show that she has a clear right to the relief that she seeks. Her case is that she has the right to allegations of poor work performance being dealt with as such and not as misconduct. That is so. The Applicant has the right that poor work performance be dealt with in accordance with the prescribed procedure. The Applicant however does not have the right to decide whether her conduct falls within the realms of poor work performance or misconduct, nor does she have the right to dictate to her employer to consider her conduct not as misconduct, but as poor work performance. The decision is the employer’s to take, not the employee’s.

[29] Once the employer has elected to follow a poor work performance process, the Applicant has the right to a poor performance process, as prescribed in the Regulations. The right that the Applicant has does not extend to her making a decision as to how her conduct should be treated or dealt with. That remains the prerogative of the employer and if the employer decides to deal with her conduct as misconduct and not poor performance, it is for the employer to follow due process. The Municipality, in making the election to institute disciplinary action instead of a poor work performance process, may be required at a later stage and in an appropriate forum to defend the election that it has made.

- [30] The Applicant failed to show that she has a right, let alone a clear right, to the relief she seeks. The Applicant is unable to show that she has a right to dictate to her employer to follow a poor work performance process and to treat allegations levelled against her as poor work performance instead of misconduct, in circumstances where her employer decided differently.
- [31] Mr Peer for the Applicant was unable to direct this Court to any enabling provision that authorises this Court to interfere with an ongoing process initiated by an employer and to dictate to an employer how to deal with allegations made against an employee. Absent a clear right, this Court cannot come to the Applicant's assistance.

Costs

- [32] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.
- [33] In *Zungu v Premier of Kwa Zulu-Natal and Others*[2] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.
- [34] Mr Peer submitted that costs should follow the result. Mr de Swardt for the Respondents submitted that the application should be dismissed with costs. In short, both parties seek an order for costs.
- [35] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Another* it was emphasized that[3]

'unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.'

- [36] In casu, the Applicant brought a meritless application to this Court and fairness dictates that the Respondents cannot be expected to endure enormous costs defending litigation where more thought and

consideration had to be put in before approaching this Court on an urgent basis. This is more so where the costs incurred by the Respondents are paid from taxpayers' money and I can see no reason why the taxpayers should be burdened with the costs in this application.

[37] In my view this is a case where it is appropriate to make a cost order.

[38] In the premises, I make the following order:

Order:

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Y Peer

Instructed by: Edward S Classen & Kaka Attorneys

For the Respondents: Mr A de Swardt of De Swardt Myambo Attorneys

[1] (2008) 29 ILJ 964 (LAC) at para 32.

[2] (2018) 39 ILJ 523 (CC) at para 24.

[3] (2012) 33 ILJ 2117 (LC) at para 88.

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