THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J2455/16

In the matter between:

MATSEMELA KLAAS HLEHLETHE **Applicant**

And

CEPWAWU **Respondent**

DATE HEARD: 17 November 2016
DATE DELIVERED: 17 November 2016
DATE EDITED: 05 June 2017

EX- TEMPORE JUDGMENT

SNYMAN, J: In this matter I am going to give an ex-tempore judgment, judgment reads as follows.

This is an application by the applicant to uplift his suspension by the 1st respondent which suspension was effected on 4 November 2016. The applicant also applied that the 1st and 3rd respondents be held in contempt of court in respect of an order granted by me against them on this same court file on the 3rd of November 2016.

This matter is not a straight forward uplifting of a suspension

case, and has several complications. What adds to the difficulties is that this matter has become inextricably linked to current infighting that has been taking place in the 1st respondent union.

I do not intend to set out a detailed account of all of the facts of this matter and will limit my references to facts in this judgment only to those facts that I consider pertinent in deciding the actual application now before me. I will now proceed to set out these facts.

On 17 October 2016 the applicant was charged with several instances of misconduct including sexual harassment, fraud and appropriation of union funds, intimidation and gross insubordination. The applicant was also suspended pending contemplated disciplinary proceedings on these charges.

In an urgent application filed on 19 October 2016 the applicant then sought to challenge his suspension and contemplated disciplinary hearing where it came to all of these charges. The applicant contended in this application that all that was happening to him was based on a purge by the general secretary of the union, Simon Mofokeng ('Mofokeng'), of all his opponents.

The applicant contended that the disciplinary proceedings against him were an occupational detriment as a result of protected disclosures he had made concerning unlawful conduct by Mofokeng.

Where it came to the issue of suspension, the applicant contended that his suspension was irregular as well as unlawful, and contrary to the union's constitution. He also complained that he did not have the opportunity to make representations prior to suspension.

The matter came before me on 3 November 2016 and by agreement between the parties a consent order was granted. The consent order included that the disciplinary proceedings where it came to the charges raised in the charge sheet of 17 October 2016, would be conducted under the auspices of the CCMA in terms of Section 188A(11) of the LRA and that an internal disciplinary hearing would not be held. It was also agreed that the suspension of the applicant be uplifted.

With the ink barely dry on the consent order the 1st respondent proceeded to go after the suspension of the applicant again. It gave notice on 3 November 2016 to the applicant to make representations why he should not be suspended and then on 4 November 2016 suspended him. It is important to consider why the suspension of 4 November 2016 was effected. Part of it relates to the same reasons for suspension prior to the order of 3 November 2016. I will deal with further detail in this respect, later in this judgment.

In the answering affidavit the 1st respondent raises several issues of further conduct of the applicant in respect of events that took place after suspension his suspension was effected on 4 November 2016. The 1st respondent has said that the applicant misconducted himself further in that on or about the 7th of November 2016 he attempted to blackmail one Ms Khoto to withdraw her complaint against him, statements were made to this effect, and a charge of intimidation was laid at the Park Road Police Station.

In addition there is a further contention that on 7 November

2016 a Mr Sebego referred to a conversation between him and the applicant where the applicant attempted to persuade Mr Sebego to convince Ms Khoto to withdraw the complaint against him. As I have said, these were instances which took place after suspension of the applicant had been effected on the 4th of November of 2016.

On 11 November 2016 the applicant then brought a further urgent application to this court to uplift his suspension which is the application that is now before me. The applicant has in this current application challenged his suspension effected on 4 November 2006 on the grounds that it is unlawful and it contravenes the court order of 3 November 2016.

In now dealing with the merits of this application I must confess that I do find the 1st respondent's conduct in first agreeing to uplifting the suspension of 3 November 2016 and then barely hours later pursuing suspension again to be rather peculiar. Why would the 1st respondent agree to such an order and then just immediately backtrack on it? That being said it must be emphasised that peculiar behaviour is not the same as unlawful behaviour.

What must immediately be said about the order of 3 November 2016 in respect of the issue of suspension is that it does not stipulate that further suspension is prohibited. If that was the case the order needed to say so specifically. All that the order did was to set aside the suspension that existed before and at that point in time and then in effect restore the *status quo ante*, prior to suspension. Restoring the *status quo* means that such restoration would always be subject to all

the rules, provisions and procedures as they existed prior to the affecting of the suspension, in the 1st respondent.

In order for the 1st respondent to have waived its rights to suspend the applicant at any time going forward and in particular after the order of 3 November 2016 thus had to be specifically stipulated in the order as I have said above. In order words the 1st respondent would have had to have waived its rights in the order and the order would have contained words to the effect that "the applicant shall not be suspended until conclusion of these proceedings".

In the judgment of *National Union of Metal Workers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at paragraphs 60 to 61 the court said as follows,

> "Waiver is the legal right act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right holder with full knowledge of the right decided to abandon it.
>
> So waiver depends on the intention of the right holder. That can be proved either through express actions or by conduct that is inconsistent with the intention to enforce that right."

There is no case made out in the founding affidavit by the applicant that the 1st respondent, knowing that it had the right to suspend the applicant decided to abandon it indefinitely. In fact the conduct as it exists shows the opposite. The 1st respondent did not oppose the 1st application of 19 October 2016 and agreed to restore, as said, the *status quo ante* where

it came to suspension. The court order, simply read, gives no indication that this right of suspension cannot be exercised going forward.

As I have said the decision to implement the suspension immediately after agreeing to uplift it may be in bad taste but it is not in itself unlawful nor prohibited by the order of 3 November 2016. What is critical in this respect as well is that the order of 3 November 2016 does not declare that the suspension is unlawful, it simply uplifts the suspension and makes no determination as to the legality of the foundation for the suspension.

The above being said, what are then the applicant's rights when it comes to suspension? Well, this is contained in the disciplinary code and procedure of the 1st respondent and I pause to read the relevant extract which is contained in Clause 6 and headed "precautionary suspension". The relevant parts of the clause are as follows,

> "8.1 In the process of conducting an investigation into the conduct of any individual that may be affected and such steps necessitate formal disciplinary steps it may well be that CEPPWAWU considers its approach, consider it appropriate that such individual(s) be suspended pending the disciplinary hearing.
>
> 8.2 This may be so due to the possibility that in the opinion of the initiators of the disciplinary steps the presence at work of such an individual(s) may jeopardise the investigation of the complaint or impair

the investigations.

8.3 The suspension referred to herein shall be on full pay and without loss of any benefits pending the finalization of the investigation and subsequent disciplinary steps."

It is clear from these provisions that the 1st respondent has the right to suspend the applicant pending disciplinary proceedings and in this case there in fact exists disciplinary proceedings to be conducted on the basis of the agreed process contemplated by the court order of 3 November 2016.

Therefore suspension in terms of Clause 8 of the 1st respondent's disciplinary proceedings is certainly competent. The applicant has suggested that the suspension is unlawful because it infringes on the union constitution and in this respect his case is founded on the contention that the suspension is not properly authorized in terms of this constitution.

In this regard the applicant sought to rely on Clause 53 of the Constitution which deals with the discipline of shop stewards which needs to be authorized by certain functionaries. The difficulty with this proposition is that the applicant is not a shop steward. He is a Regional Secretary actually employed by the union. Shop stewards are not employed by the union.

In the case of disciplinary action by the union against its own employees the provisions of the union code of conduct and disciplinary procedure must apply. This is the procedure in which Clause 8 which I

have referred to above is contained. I might also refer to Clause 2 of this disciplinary code which reads specifically in 2.2 thereof,

> "Elected staff members of the union who are holding positions in terms of the constitution of CEPPWAWU and the employees of the union (non worker office bearers) these include the general secretary, deputy general secretary and regional secretaries and this definition is the definition that then provides to whom the code applies."

So in terms of the code itself, it would apply to the applicant as a regional secretary.

As a result the argument of the applicant that the suspension may be unlawful based upon what is contained in the constitution of the union has no substance and must be rejected.

In this case the suspension is not a disciplinary measure. It is a holding operation. Any suspension of an employee preceding commencement of disciplinary proceedings is not the actual conducting of discipline itself, as the purpose of the suspension is to mitigate further risks to the employer because such discipline is contemplated, but has not yet come to pass.

As to the purpose of this kind of suspension, also referred to precautionary suspension, the court in *Koka v Director General Provincial Administration North West Government* (1997) 18 ILJ 1718 (LC) referred with approval, to the following remarks made in the judgment of *Lewis v Heffer and Others* 1978 (3) All ER 354 (CA) at 364 C to E,

> "Very often irregularities are disclosed in a government department or in a business house and a man may be suspended on full pay pending enquiries. Suspension may rest on him and he is suspended until he is cleared of it. No one as far as I know has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth.
>
> The suspension in such a case is merely done by way of good administration. A situation has arise in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work the man is suspended. At that stage the rules of natural justice do not apply."

I dealt with similar considerations in the judgment of *Madamela Ida v The Department of Corporate Governments* 2014 ZALCJHB 225 dated 5 September 2013 at paragraph 17 and said,

> "At level of general principle precautionary suspension is a unilateral act by the employer which need not be preceded by the application of the principles of audi alteram partem.
>
> It is only where specific rules which is often the case in the public centre, in the public sector, prescribe the application of audi alteram partem prior to suspension that it must be applied. It is then applied not because of a general principle of the right to be heard but because the particular rule in fact stipulates it

as an essential requirement. In that case the compliance is so because the employer has made its own rules and must comply with them."

There are many of these kind examples in judgments. I can refer to my judgment in Manamela Ida (supra) at paragraph 20, *Nyati v Special Investigating Unit* (2011) 32 ILJ 2991 (LC), *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC), *Lebo v Makwassi Hills Municipality and Another (2)* (2012) 33 ILJ 653 (LC) and *SAMWU on behalf of Dlamini and 2 Others v Mogale City Local Municipality and Another* [2014] 12 BLLR 1236 (LC).

Accordingly the applicant cannot rely on unfair conduct relating to the right to be heard prior to suspension, or other unfair conduct, in these proceedings. If the applicant wants to rely on the principle of unfairness and allege that he has been unfairly treated he can only do so in terms of the unfair labour practise jurisdiction and raise this issue in terms of unfair labour practise dispute resolution processes in the CCMA.

In *Member of the Executive Council for Education North West Province v Gradwell* (2012) 33 ILJ 2033 (LAC) the court said the following at paragraph 45,

"The right to a hearing prior to a precautionary suspension arises therefore not from the constitution PAYA or as an applied term of the contract of employment but is a right located within the provisions of the LRA the correlative of the duty on employers not to subject employees to unfair labour

practises.

That being the case the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to these rights."

The point is that such a case can only be pursued in the CCMA under the Unfair Labour Practise jurisdiction and not raised in this court unless there are exceptional and compelling circumstances which simply do not exist *in casu*.

Therefore and in this case, there is no necessity for a prior hearing where it came to suspending the applicant. The 1st respondent was given a discretion to do so based on the circumstances set out in the disciplinary code. These considerations were indeed satisfied based on what is reflected in the suspension notice itself. Normally that would be the end of the matter for the applicant as he cannot establish a right to the relief sought. The only question that remains is whether the court order of 3 November 2016 changes anything.

The application has argued that the circumstances as it existed when the order was granted was exactly the same as the circumstances when the suspension was then again affected immediately following the court order. The applicant contents in this context that being aware of these circumstances and then agreeing to uplift the suspension which was made a court order the 1st respondent should in effect be held bound to this.

The application in argument conceded that should circumstances perhaps change the court order would not stand in the

way of the applicant being suspended again. So and if the applicant did something wrong or committed conduct after the order was granted that would justify suspension then the 1st respondent would be free to suspend him but because there was no such changed circumstances when the suspension was uplifted on 3 November 2016 and then affected on 4 November 2016, and according to the applicant, the court should have to stand in the way of such suspension being affected.

Also and what may have happened when it came to the later alleged misconduct of the applicant after this 4 November 2016 suspension simply cannot serve to justify *ex post facto,* so to speak, the actual suspension affected earlier as this earlier suspension could simply not have been founded on these later facts.

I find merit in this argument of the applicant. Whilst it is so that the 1st respondent indeed has a discretion to effect the suspension of the applicant as a holding operation it must base that discretion on something. A discretion cannot be exercised in a vacuum.

In the case of the October 2016 suspension of the applicant the 1st respondent based that discretion on the pending disciplinary hearing and the serious nature of the allegations of misconduct against the applicant. These circumstances continued to exist when the matter came before me on 3 November 2016. The 1st respondent had to be aware that his was indeed the case. The 1st respondent could have decided to oppose the issue of the uplifting of the suspension based on this but instead it chose to agree to uplift the suspension of the applicant.

The simple point then has to be that the most natural plausible and logical inference that can be drawn from this conduct of the 1st respondent is that despite being aware of its rights in this regard it decided to agree to abandon the suspension based on these considerations. I again stress that this conduct cannot be seen to be waiver of rights going forward but it can be seen to be a compromise for that which existed at that point in time and into the past.

To then rely on the exact same considerations again to effect the suspension immediately after agreeing to uplift the suspension based on those same considerations is simply not appropriate. In my view this is a classic case where the once and for all rule should find application. In *Jansen van Rensburg NO and Others v Steenkamp and Another – Janse van Rensburg and Others v Myburgh and Others* 2009 (1) All SA 539 (SCA) at paragraph 27 the court said,

> "The scope of the once and for all rule was said in the National Sorghum case Supra at 241 D to E to require that all claims generated by the same cause of action be instituted in one action."

As to when the cause of action would be considered to be the same the court in *Fidelity Guards Holdings Pty Ltd v Professional Transport Workers Union and Others* (1999) 20 ILJ 82 (LAC) at paragraph 7 said,

> "The cause of action is the same whenever the same matter is in issue: *Wolfaardt v Colonial Government* 16 SC 250 at 253. The same issue must have been adjudicated upon. An issue is a matter of fact or question of law in dispute between two or more parties

> which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought: *Horowitz v Brock & others* 1988 (2) SA 160 (A) at 179F-H. …. The reason for the rule is to prevent difficulties arising from discordant or mutually contradictory decisions due to the same action being aired more than once in different judicial proceedings: Voet 44.2.1. The object of the rule is that of public policy which requires that there should be an end to litigation and that a litigant should not be harassed twice upon the same cause"

10 Applying the above, the point is simply that the aforesaid considerations were part and parcel of what was before court in the application brought on 19 October 2016 and on which the agreed order of 3 November 2016 was based. It is the same considerations which despite existing still resulted in the uplifting of the suspension by way of the court order.

The above being the case, it can then be argued that the 1st respondent had no legitimate basis on which to found the existence of its discretion on 3 and 4 November 2016 and then effect the suspension of the applicant. That being the case it should be the end of the matter for the 1st respondent and the applicant should be entitled to the relief.

20 However a proper consideration of the notice of intention to suspend on 3 November 2016 and the actual notice of suspension of 4 November 2016 is still required to decide whether indeed the aforesaid scenario is actually the case and the grounds and reason for suspension still remains the same. In short, are there indeed new grounds for precautionary suspension? I have touched on the grounds for

suspension, on the facts, earlier in the judgment.

Now a consideration of the notice of suspension on 4 November 2016, as well as the notice of intention to suspend on 3 November 2016 shows the following.

> "In particular CEPPWAWU (the union) is concerned about the alleged sexual harassment, intimidation of staff and members, convening of unconstitutional meetings, threats of violence against staff and office bearers and alleged fraud, misappropriation of regional, of regional funds."

If that ground of suspension is considered it is indeed the same ground as existed prior to the order of 3 November 2016, and the once and for all rule applies. However the notice then adds the following,

> "Furthermore it is alleged that you are continuing to act in a manner that is detrimental to the union and/or its interests."

It also adds,

> "The NOBS is concerned that you may continue to disrupt and render the region dysfunctional as well as interfere with further investigation and the intimidation of potential witnesses."

The actual notice of suspension of 4 November 2016 then adds the following as specifically a reason for the affecting of the suspension,

> "The possibility of continued misconduct on your part."

What the aforesaid shows is that the circumstances giving rise to suspension as set out in the notice of intention to suspend and the notice of suspension in fact do refer to different circumstances as those that existed prior to the order on 3 November 2016.

As a general principle suspension pending a disciplinary hearing, which is the case in this instance, would normally be justified. And as matters now stand, some of the grounds upon which the suspension of the applicant pending this hearing is pegged, is that of allegations of continuous action detrimental to the union, may continue to disrupt and interfere with investigation, and possibility of continuous misconduct and to prevent further intimidation.

Accordingly and even if the grounds that applied when the order was granted on 3 November still relied upon in the suspension of 4 November 2016 are weeded out, other grounds still remain which can serve to justify the suspension of the applicant. In short, the suspension of the applicant is not only founded on that which existed prior to 3 November 2016 but is founded on other considerations as well.

In this context the later misconduct as referred to in the answering affidavit can serve to justify these grounds as it is precisely these fears that served as basis of at least two of these additional grounds added in the notice of intention to suspend and the notice of suspension.

The content of the answering affidavit in this respect must be accepted for the purposes of deciding this matter, based on the principle enunciated in *Plascon Evans Paints v Van Riebeeck's Paints* 1984 (3) SA 623 (A) at 634 E to 635 C.

As to the issue of the alleged contempt by the 1st respondent of the order of 3 November 2016 this was not pursued by the applicant in argument. In any event and considering what is set out above the

argument has no merit and nothing the 1st respondent did in this case was *male fide*, so no contempt can even be seen to exist.

I must say that I think this is a case where justice and fairness will be far better served if the applicant does not attend at work pending the proceedings in the CCMA. It is clear to me that the applicant's presence at work, rightly or wrongly so, could simply serve to escalate conflict at this stage, prior to the finalization of the CCMA disciplinary hearing case. It is in the best interest of all that the suspension stands.

Accordingly there is no basis to interfere with the applicant's suspension of 4 November 2016 and the application falls to be dismissed.

Where it comes to costs I have a wide discretion in terms of Section 162(1) of the LRA. In this matter the parties still have an ongoing continuing relationship. Further the parties are still going to face one another in disciplinary proceedings to follow under the auspices of the CCMA. In my view it would be unfair to in all these circumstances to mulch either party with a cost order against them, and thus no order as to costs would be appropriate in this instance.

Based on all of the above reasons I therefore make the following order.

ORDER

1. The applicant's application filed on 11 November 2016 is dismissed.
2. There is no order as to costs.

S SNYMAN

Acting Judge of the Labour Court of South Africa