Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case : 2024-133838

In the matter between:

DENOSA obo M D BINZA	**Applicant**
and	
DEPARTMENT OF HEALTH, WESTERN CAPE PROVINCE	**Respondent**

Date of Hearing: 27 November 2024

Date of Judgment: 9 December 2024

Summary: (Urgent – application to uplift suspension pending outcome of unfair labour practice – chairperson of enquiry declining to extend suspension – 60 day suspension period expired - Application struck off the roll for lack of urgency)

JUDGMENT

LAGRANGE J

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Introduction

[1] This is an urgent application launched on 19 November 2024 to uplift the precautionary suspension of the applicant, Mr M D Binza ('Binza'), the chief executive officer of Khayelitsha District Hospital, to permit him to return to work, pending the outcome of an unfair labour practice claim relating to suspension, which he had referred to the relevant bargaining council at the same time as launching this application. The respondent ('the department') opposed the application.

[2] The application was argued on 27 November 2024. On 29 November, Binza sought leave to introduce a supplementary affidavit. The application was argued on 27 November 2024. On 29 November, Binza sought leave to introduce a supplementary affidavit and the respondent filed a supplementary affidavit anyway. In view of the fact that the supplementary affidavit disclosed information unknown to Binza at the time and which the department should have disclosed to the court, leave to file the supplementary affidavit and the answering one is warranted.

Factual background

[3] On 27 August 2024, after giving Binza an opportunity to submit representations why he should not be placed on precautionary suspension, he was suspended on full pay on 27 August in terms of clause 2.7 of the Senior Management Service Handbook.

[4] Clause 2.7(2)(c) of the SMS handbook provides that: *"If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement."*

[5] Further, clause 3 of the DPSA Public Service Precautionary Suspension Guide, which sets out principles applicable to such suspensions, states: *"The period of precautionary suspension must be reasonable and justifiable but should not exceed 60 calendar days."* It also states: *"The employee must return to work should the hearing not be concluded within 60 calendars days;…"* (original emphasis).

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[6] The 60-day period of initial suspension expired on 26 October and Binza's union ('DENOSA') sent a letter to the department advising that Binza would report for duty on 30 October as his suspension had lapsed. On that day, the department asked him not to report for work as it intended to urgently apply to extend his suspension. On 4 November, this was followed by a notice to Binza to attend a hearing on his precautionary suspension on 7 November. The following provisions of the Approved Directive on Discipline Management in the Public Service, are pertinent: section 8.10 provides that the disciplinary enquiry must start within 60 days of the suspension; section 8.12 states the chairperson may extend the suspension beyond the 60 day period, and section 8.13 states that if, at 60 days, a hearing is not scheduled to consider the continuation of the suspension, the suspension falls away and the employee must be permitted to return to work.

[7] The hearing duly took place, and the presiding officer issued his decision on 8 November. In essence, he decided that, since the 60-day period of suspension had already lapsed by the time the hearing was convened on 7 November. Accordingly, he could not extend it because it no longer existed and he had no authority to reinstate the precautionary extension, which lay with the Head of Department in his view.

[8] DENOSA followed up on this ruling, by demanding that Binza be allowed to return to work. The department, somewhat belatedly, responded that given the seriousness of the allegations and that the investigation was still incomplete, it had decided to suspend him again pending further investigation and the finalisation of the disciplinary proceeding.

[9] In the supplementary affidavit filed by Binza two days after hearing the urgent application, he brought to the court's attention that while argument was in progress in court, the Assistant Director: Labour Relations in department, Mr J Horne ('Horne'), had emailed him a notice attend a disciplinary inquiry on 10 December 2024. In court, the department was arguing that the suspension was still required because the investigation into the alleged misconduct was still incomplete. In an answering affidavit, Horne claimed the decision to proceed with the disciplinary hearing was only taken at 15h30. However, that fails to explain how the notice could have been e-emailed to Binza at 14h34

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the same afternoon and is at odds with what he says elsewhere in his affidavit, namely that he was instructed by senior management of Metro Health Services on 26 November that he must initiate the enquiry.

[10] While there is no reason to believe that the state attorney or the department's counsel was aware of this development at the time the urgent application was argued on 27 November, the department was under an obligation to make sure the court was aware of this development by the time the application was heard. Its failure to do so is without any excusable justification as it was obviously a potentially relevant consideration in the application before the court. Be that as it may, in the result its unacceptable conduct does not affect the primary considerations in evaluating the merits of determining the application to uplift the suspension on grounds of alleged unfairness.

Evaluation

[11] Although he claims his suspension is unlawful, Binza does not seek an order of specific performance but argues that he has established that he has established exceptional and compelling circumstances warranting the urgent intervention of the court as a matter of unfairness. His reluctance to assert a right to relief based on a claim that the suspension was unlawful is doubtless informed by the change in approach to such claims adopted by this court since the Constitutional Court decision in In *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening).*[1]

[12] He finds support for this intervention in the judgment in *Booysen v Minister of Safety & Security & others*.[2] In that case, the LAC held that this court did

[1] (2016) 37 *ILJ* 564 (CC). Whereas prior to *Steenkamp*, it was accepted that the Labour Court had jurisdiction to set aside unlawful decisions to suspend an employee (see, e.g *Nyathi v Special Investigating Unit* (2011) 32 *ILJ* 2991 (LC) or *Mathe v Minister of Water & Environmental Affairs* (2010) 31 *ILJ* 2651 (LC)), the prevailing view appears to be that such relief is no longer competent (see, e.g. *Democratic Municipal & Allied Workers Union of SA & others v City of Johannesburg* (2020) 41 *ILJ* 912 (LC), *Botes v City of Joburg Property Company SOC Ltd and Another* (2021) 42 ILJ 530 (LC) and *Strydom v Arcelormittal SA* (2024) 45 ILJ 931 (LC)). An exception to this view is the decision in *Gallocher v Social Housing Regulatory Authority & another* (2019) 40 *ILJ* 2732 (LC), though it appears the question of the court's jurisdiction to declare a suspension unlawful was not raised as an issue.

[2] (2011) 32 *ILJ* 112 (LAC)

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have the power to interdict unfair conduct but only in exceptional circumstances.[3]

[13] Binza argued that his continued suspension subjected him and his family to psychological stress and trauma and diminished his dignity. He also suffers reputational harm in consequence of his suspension. He is confident that a ruling from the bargaining council on his unfair labour practice claim over his suspension will be in his favour. However, he contends that such an award will be a pyrrhic victory because it will not address the harm, which he currently experiences because of the department flouting the policy governing the extension of his precautionary suspension. Put differently, obtaining a favourable award in due course from an arbitrator is not an adequate remedy for the prejudice he is suffering in the meantime. Consequently, the urgent relief he seeks is the only satisfactory recourse he has. By contrast, he argues, there is no material prejudice the department will face. Moreover, paying him to stay at home is a waste of public money.

[14] The department argues, as it did at the suspension hearing, that Binza was implicated in misconduct in several disclosures made by a whistle-blower, whom he had allegedly threatened in a meeting. It claims also that several witnesses had come forward to assist the investigation, after he was suspended. In the circumstances, it was concerned his presence at work could possibly undermine and compromise the investigation. It defends its reimposition of Binza's suspension in the face of the chairperson's adverse ruling as it contends the chairperson was required to consider whether to extend the suspension and abdicated his role by finding he could not do so.

[15] It might seem, superficially, that this is a matter deserving of the court's intervention. However, it is necessary to consider if the circumstances are truly exceptional. Situation and warrant urgent intervention. On the question of reputational harm, it has been held on more than one occasion that being suspended on a precautionary basis, while prejudicial, is not sufficient to justify permitting an employee to return to work.[4] It is important to remember

[3] At paragraph 54.

[4] See *Dladla v National Consumer Tribunal and Another* (J1535/2023) [2023] ZALCJHB 311 (10 November 2023) at paragraphs 38 to 41.

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that the employee has suffered no loss of income. Any anxiety caused by a possible future loss of income can only relate to the potential outcome of any disciplinary enquiry and is unwarranted based solely on being subject to a precautionary suspension on full pay. Binza says he has even had to consult a psychologist as a result of the stress his suspension has caused him and his family. That is regrettable, but unfortunately proceedings of this nature can naturally be expected to engender a degree of stress in anyone subject to them, irrespective of the merits of the measures imposed. The suspension is not extraordinarily long even though it has exceeded the initial 60-day period. Coming to the balance of convenience, just as it is true that any embarrassment or stress suffered of being suspended cannot be completely addressed by an arbitration in due course, neither can any risk of interference by Binza be remedied after the fact, if he is allowed to return. The fear of interference does not appear to be groundless. In the circumstances, I am not persuaded the balance of convenience favours Binza.

[16] A final issue to consider is the nature of the right Binza asserts. It is a right to have a precautionary suspension declared and unfair labour practice. The Labour Relations Act, 66 of 1995 ('the LRA") has provided a process that the legislature deemed adequate to redress such unfair conduct by an employer. There is a danger that if this court too readily accepts that just because it would make some sense for it to intervene before that process has been concluded, this could have the effect of rendering the intended statutory remedy nugatory, because the relief afforded by the court would in many instances be more effective than relief awarded in due course. That is why the circumstances warranting urgent relief of this nature must be truly unusual and exceptional, and I am not satisfied that Binza has established that the circumstances of his suspension are such.

[17] In light of the discussion above, I am not satisfied that Binza does not have a suitable alternative remedy in the form of an unfair labour practice claim which he has invoked, and that the application must fail for lack of urgency.

Order

1. The Applicant's supplementary affidavit and the Respondent's supplementary answering affidavit is admitted.

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2. The application is struck off the roll for lack of urgency.

3. No order is made as to costs.

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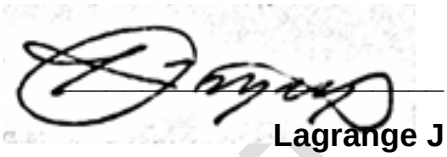

Lagrange J
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Donald Carls from Carls Attorneys
For the Respondent:	F Rodriques
Instructed by:	State Attorney Cape Town

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