



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2499/10

In the matter between:

DIMAKATSO ERASMAUS MASHEGO

Applicant

And

MPUMALANAGA PROVINCIAL LEGISLATURE

First Respondent

SPEAKER OF THE MPUMALANGA

PROVINCIAL LEGISLATURE

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

COMMISSIONER: THOMAS NTIMBANA

Fourth Respondent

Heard: 31 January 2014

Delivered: 22 July 2014

Summary: Review –Commissioner ruling that the employer did not commit an unfair labour practice in suspending the applicant. The employee contending that he was not given sufficient time to prepare a response prior to the suspension. The employee contending that the

merits of the allegations against him should have been considered before suspending him. The employer has discretion to suspend depending on the nature of the offence.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an application to review and set aside the arbitration award made under case number MP 1714/2010 dated 25 August 2010, in terms of which the fourth respondent (the Commissioner) dismissed the applicant's claim that the second respondent in suspending him committed an unfair labour practice.

The factual background

[2] The applicant was, at the time the dispute arose, employed as senior legal advisor to the Mpumalanga Provincial Legislature. The dispute which the applicant referred to the CCMA arose from his suspension by the secretary of the legislature, Mr Moropa. Before effecting the suspension Mr Moropa issued the applicant with the letter which reads as follows:

'Re: NOTICE OF INTENTION TO SUSPEND YOU FROM DUTY:
YOURSELF

1. Kindly be advised that the Mpumalanga Provincial Legislature is currently investigating allegations of gross misconduct against you. The said allegation of misconduct related to amongst others gross negligence in the drafting of the Financial Management of the Provincial Legislature Bill, 2009 as well as act as a gross insubordination.

2. In my view your presence at work during the investigation would jeopardise the investigations and you will be having contact with potential witnesses as well as access to documentation which is vital for the investigations and thus I intend to suspend you from duty pending the investigations and a possible disciplinary hearing.
3. The intended suspension will be on full remuneration as it is merely a precautionary measure.
4. I therefore request you to provide my office with the written reasons as to why you should not be suspended from duty in the circumstances. The reasons should reach my office by not later than 16h15 today the 16th of February 2010. In the event I do not receive your written reasons by the time stipulated above I would proceed to finalise this matter without your representations.'

[3] It is common cause that the applicant was suspended subsequent to his response to the above letter and after making his submission as to why he should not be suspended.

[4] The suspension was effected in terms of clause 7.9 of the Mpumalanga Provincial Legislature Labour Relations Policy which provides that an employee may be suspended on full pay if:

'7.9.1 The employee is alleged to have committed a serious transgression;

7.9.2 The employer believes that the presence of the employee in the workplace might jeopardize any investigation into the alleged misconduct; or

7.9.3 The employee endangers the lives or wellbeing or safety of any person or state property; or

7.9.4 A suspension of this kind is a precautionary measure that does not constitute judgement.'

The grounds for review

- [5] The contention that the arbitration award is reviewable is based on the grounds that the Commissioner:
- 'a. Ignored or failed to consider that the First Respondent is a public body; therefore it requires more accountability than a private company when suspending an employee; and there are more requirements it needs to comply with;
 - b. Made an improper analysis of the evidence in finding that the Applicant was afforded a reasonable opportunity to state his case before the suspension was confirmed;
 - c. Ignored or failed to consider the fact that it is not up to that the Applicant to request a reasonable opportunity to respond to the notice of intention to suspend, but the responsibility of the First Respondent to offer one.'

- [6] The applicant further contended that the Commissioner failed to properly analyse the evidence regarding a number of issues arising from his suspension, amongst which included whether he was afforded sufficient time to respond and whether the issue that led to the suspension was properly set out in the letter of suspension.

The arbitration award

- [7] The Commissioner's conclusion that the respondents did not, in suspending the applicant, commit an unfair labour practice is based on the following findings:
- 7.1 The applicant was given the opportunity before his suspension to show cause why he should not be suspended.
 - 7.2 The applicant responded to the call to show cause why he should not be suspended and never raised the issue that the time given for him to respond was insufficient.
 - 7.3 The subject matter of the investigation was fully disclosed to the applicant, and

7.4 The suspension was on the basis that the presence of the applicant at work would prejudice the investigation.

[8] Furthermore, the Commissioner found that not only did the first and second respondents have the discretion to suspend the applicant but that they did that in accordance with the time frames provided for in the policy.

The test for review

[9] The test to apply when dealing with a review application is that of a reasonable decision maker, often referred to as the *Sidumo* test.¹ It has been stated repeatedly by the Courts in interpreting *Sidumo* that the reasonable decision maker test is very stringent and thus the reviewing Court will not lightly interfere with the outcome of the arbitration proceedings. In order to succeed in a review application, the applicant has to persuade the Court that (based on the grounds of review) the decision reached by the arbitrator which is the subject of the review application falls outside the confines of reasonableness. The focus of the inquiry is generally on the outcome of the proceedings rather than the process. In focusing on the outcome of the arbitration proceedings, the Court will take into account the totality of the facts and the materials that properly served before the Commissioner during the arbitration proceedings.

Evaluation

[10] It should be noted that the suspension in this matter was not done in the context of punishing the applicant but rather as a precautionary measure pending the outcome of an investigation. It is generally accepted that an employer has discretionary power to suspend an employee if the presence of such an employee at work is likely to undermine the investigation.²

¹ See *Sidumo v Rustenbrg Platinum Mines and others* (2007)12 BLLR 1097 (CC).

² See *Koka v Director-General: Provincial Administration North West Government* [1997] 7 BLLR 874 (LC).

- [11] In practice the suspension hearing is different to a hearing in a disciplinary inquiry involving for instance misconduct. The hearing in a suspension process entails employee been invited to make a representation in writing as to why he or she should not be suspended pending the outcome of either the investigation or the disciplinary hearing. In a disciplinary hearing, the process entails in general witnesses being called to substantiate the alleged misconduct on the part of the employee. The suspension hearing entails the employer setting out the details of the allegations upon which it wishes to rely on in suspending the employee and calling on him or her to show cause why he or she should not be suspended pending the investigation or the disciplinary inquiry.
- [12] The case of the applicant in the present matter seems to be that he was denied a fair hearing because he was not given a full hearing similar to that applicable in a disciplinary hearing. In other words, the case of the applicant is that he was not afforded a fair hearing because the applicant did not deal in the suspension process with the merits of the alleged misconduct. I do not agree with that proposition as a suspension process by its nature is intended to afford the employer the opportunity to investigate the merits and also the demerits of the alleged misconduct. The key aspect in determining the fairness of the suspension is whether the employer had, based on the nature of the allegations, formed a view that the allegations are so serious as to warrant a suspension.
- [13] In the present case, it is apparent from the reading of the arbitration award that the Commissioner applied his mind to the issue at hand and took into account all the relevant facts and circumstances relating to the suspension of the applicant. The allegation of the misconduct which the first and second respondents needed to respond to was spelt out in the letter which was addressed to the applicant. The details and the substance of the allegation were set out in the same letter and thus the applicant knew when he made his response as to the basis upon which the first and second respondents intended to suspend him for.

- [14] The complaint by the applicant that he was not given enough time to respond bears no merit because at the time he made his submission, he never complained or requested that the time for responding should be extended. His letter responding to the call on him to show cause why he should not be suspended makes no mention that the time afforded to him was too short. It would appear the complaint of not being afforded enough time to respond to the intention to suspend him is an afterthought formulated subsequent to his unsuccessful challenge of the suspension.
- [15] It would appear from the submission made by the applicant during the hearing of the review application that his complaint is that he should have been given the opportunity before the suspension to deal with the merits of the allegations upon which the suspension was based on. In other words the applicant's contention is that a full hearing dealing with the details of the allegations against him should have been conducted before he was suspended.
- [16] It is also important to note that the applicant does not dispute the errors in the draft Bill which formed the basis for the alleged negligence. He also conceded during his reply to the charge of poor work performance which was essentially the basis for his suspension. He contended that whilst there were mistakes in the draft Bill, they did not warrant a suspension.
- [17] In my view, based on the above discussion, it is apparent that the applicant has failed to make out a case justifying interference with decision of the Commissioner that the first and second respondents did not commit an unfair labour practice.
- [18] The issue that remains for consideration is the issue of costs. The applicant submitted that costs should not follow the result in the event that his review application was unsuccessful. He contends that he was initially assisted by an attorney when he launched the proceedings and that at that stage, there was a clear cause of action being that he was

suspended. The other points he made regarding why costs should not follow the results are that:

- 18.1 He did not bring with him his file to the Court on the day of the hearing because he did not anticipate that the matter would proceed on that day.
- 18.2 He was not afforded an opportunity to consult regarding the allegations which had been made against him.
- 18.3 He thought that he was pursuing a case which was "pursuable."
- 18.4 The merits of his case were overwhelming.
- 18.5 The court should not discourage individuals from approaching the court for assistance.

[19] It is trite that the Court has a broad discretion in terms of section 162 of the LRA to make an order for costs according to the requirements of the law and fairness. In the present instance, there is no reason why the applicant should not be ordered to pay the costs of the first and second respondents. The applicant is a lawyer who was given an opportunity to state his case before his suspension. The applicant persisted with his baseless review despite the fact that the disciplinary hearing had already taken place and had been found guilty of the allegations which formed the basis of his suspension. The first and second respondents were unreasonably hauled to Court by the applicant who as indicated persisted with that attitude even after the allegations which formed the basis for his suspension were investigated and proven to be valid. It is for this reason that I agree with the first and second respondents that the appropriate costs order in the circumstances should be punitive.

Order

[20] For the above reasons, I make the following order:

1. The application to review and set aside the arbitration award made under case number MP 1714/2010 dated 25 August 2010, is dismissed.
2. The applicant is to pay the costs of the first and second respondents on an attorney and client scale.

MOLAHLEHI, J

Judge of the Labour Court

LABOUR COURT

Appearances:

For the Applicant : In person

For the First and Second Respondents: Advocate M.H Marcus

Instructed by : Lebea and Associates.

LABOUR COURT