REPUBLIC OF SOUTH AFRICA

Of interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 88/2013

In the matter between:

MOTITSWE BENJAMIN P BENNITO **Applicant**

and

CITY OF TSHWANE **Respondent**

Heard: **24 January 2013**

Delivered: **24 January 2013**

Summary: (Urgent-opposed-Application to uplift suspension – requirements for interim relief not met - Counter-application-to declare employment contract and appointment to have lapsed – struck off for lack of urgency).

REASONS FOR JUDGMENT

LAGRANGE, J

Introduction

[1] The first application in this matter was brought on an urgent basis to uplift the applicant's suspension of service on 11 January 2013 by the respondent municipality, on an interim basis, pending the determination of an unfair labour practice dispute concerning the alleged unfair suspension, which was referred to the CCMA on 17 January 2013. This application was launched at the same time.

[2] On the day of the hearing, the respondent launched a counter application, unsupported by a founding affidavit, asking the court to declare that the applicant's appointment as the Executive Head: Strategic Administrative Support Services had lapsed because no performance agreement had been concluded within 90 days of the commencement of his duties on 1 July 2012. The respondent argued that the conclusion of such an agreement was a suspensive condition of the applicant's employment contract and if it was not concluded the contract could not come into effect, which would result in the lapsing of his appointment.

[3] After considering the matter and hearing both parties representatives, I made an order dismissing the applicant's application to uplift his suspension pending the outcome of CCMA proceedings and struck off the counter application for lack of urgency. My brief reasons for the order of set out below.

The counter application

[4] The only reason this application was brought was an attempt to thwart the main application to set aside the applicant's suspension. It was brought on almost no notice and it had previously done nothing at all to act on its alleged entitlement to treat the appointment as if it had lapsed even though it could have done so since October 2012 on its own version. In the circumstances, whatever the substantial merits of this claim might be, the respondent had woefully failed to demonstrate any good reason why it should be determined on an urgent basis: expedience alone cannot justify

urgency. Hence, the counter application was struck of the roll for lack of urgency.

The main application

[5] In *Setlogelo v Setlogelo* 1914 AD 221 at 227 the general requisites for obtaining urgent interim relief were that the applicant must demonstrate *(a)* a clear right which, 'though *prima facie* established, is open to some doubt'; *(b)* a well grounded apprehension of irreparable injury; *(c)* the absence of an ordinary remedy. In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted, which is referred to as the balance of convenience.

[6] The applicant maintained that he was subject to the provisions of Regulation 6 of the Disciplinary Regulations for Senior Managers issued in terms of the Municipal Systems Act, 32 of 2000. However the respondent maintained that he was not a senior manager contemplated by section 56 of the Systems act because he was not directly accountable to the municipal manager, which is a pre-requisite for appointments in terms of that section. At the very least, there was some serious doubt whether the applicant could rely on the disciplinary regulations.

[7] Secondly, it is not disputed that when he was issued with a notice of the respondent's intention to suspend him he made no attempt to make representations at the time why he should not be suspended. Thus, despite not making use of alternative processes available to him to avoid his suspension, he asked the court to intervene.

[8] From the e-mail correspondence between the applicant and his line manager, Mr Matsena, it is apparent that the applicant engaged his superior in a combative manner, which tends to suggest that the applicant's presence at work pending the enquiry might have entailed a risk of a volatile situation developing between them. The prejudice to the applicant of not been allowed to work pending the enquiry in the event that he succeeded in having his suspension overturned at the bargaining Council, in my mind was outweighed by the potential prejudice of him

remaining at work, even if the employer successfully defended its decision to suspend him.

[9] In short, I am not satisfied that the applicant had established a *prima facie* right to be suspended in accordance with the regulations. Moreover, he made no effort to make representations to avoid his suspension, when he had the opportunity to do so, thereby abandoning an alternative remedy available to him. He ought at least to have tried that alternative before approaching this court. Lastly, the balance of convenience favoured the respondent party.

_____

R LAGRANGE, J
Judge of the Labour Court of South Africa
11 March 2013

APPEARANCES

APPLICANT: J L Basson instructed by M J Van Vuuren

FIRST RESPONDENT: K Tsatsawane instructed by Gildenhuys Malatji Inc.