THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2525/15

Reportable

In the matter between:

CHRISTABLE NOBELE MBEKELA **First Applicant**

SOLOMON MOTSWADISE MAKGALE **Second Applicant**

and

JOHANNES KOMOTSO PHAHLANE **First Respondent**

MINISTER OF POLICE **Second Respondent**

Heard: 23 December 2015

Delivered: 05 January 2015

Summary: Urgent application: Powers of the Acting National Commissioner of the Police to suspend. Regulation 13.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] The applicants in this urgent application seek a declaratory and mandatory interdict relating to their suspension by the first respondent. The order they seek is that of declaring their suspension by the respondents to be invalid and unlawful and to direct the suspension be uplifted.

[2] The application is opposed on both its urgency and the merits.

The parties

[3] The first applicant, Mr Mbekela, is Deputy National Commissioner: Corporate Service Management and the second applicant, Mr Makgale, is a Lieutenant General, Head of Corporate Communication, Marketing Liaison in the South African Police Service (SAPS). The applicants have instituted the present application jointly because the facts upon which they base their complaints are the same in relation to the findings of the Police Portfolio Committee in Parliament.

[4] The first respondent, Mr Phahlane, is a Lieutenant General who is currently acting in the position of the National Commissioner who is on suspension. The second respondent, the Minister of Police is cited in his nominal capacity as the executing authority of the SAPS.

Background facts

[5] It is common cause that soon after his appointment as Acting National Commissioner, the second respondent expressed an intention to have the first applicant "discharged" from the services of the SAPS. The intention was expressed in the letter in the following terms:

> '1. Kindly note that I am considering your possible discharge from the South African Police Service in terms of the provisions of section 35 (b) of the South African Police Service Act, 1995 based on the following:

1.1 The deferment of your retirement age For a Period of Three Years Has Been Approved by the Minister of Police on 2015- 3-02;

1.2 the deferment is based on your involvement in the four projects/initiatives are set out in your application for deferment . . . '

[6] The reasons for invoking the provisions of section 35 of the SAPS Act[1] as set out in the letter is in essence related to the restructuring of the services of the SAPS. The letter further invited the first applicant to provide reasons why the above decision should not be implemented. It is apparent from the reading of s 35 that the discharge would have to take form of operational reasons based on restructuring.

[7] It is further common cause that soon after making her submission as to why her services should not be terminated, the first applicant received a notice of the intention to institute disciplinary proceedings against her.

[8] On 23 November 2015 the applicant received the letter from the first respondent indicating amongst others that the intended discharge in terms of section 35 (b) of the SAPS Act was no longer under consideration. The letter also stated that since the intention to discharge was served on the first applicant the following have occurred:

'4.1 On 11 November 2015 the Portfolio Committee on Police released a Draft Rule 201 Enquiry Report (Draft 5 A). In the said report serious allegations of impropriety have been levelled against yourselves and I am under a constitutional obligation to have the allegations investigated and to have appropriate action taken in the event of prima facie misconduct.

4.2 On 12 November 2015 you filed an Urgent Application in the Labour Court, Johannesburg to interdict the Acting National Commissioner and the Minister of Police from taking certain decisions. Although the application was subsequently withdrawn your founding affidavit contains certain statements which lack the decorum one could expect from your office. The statement also prima facie

[1] Section 35 pf the SAPS Act reads as follows: "The National Commissioner may, subject to the provisions of the Government Service Pension Act, 1973 (Act 57 of 1973), discharged a member-

(a) Because of the abolition of his or her post, or the reduction in the numeral strength, the reorganisation or the readjustment of the Service;
(b) If, for reasons other than that unfitness or incapacity of such member, his or her discharged will promote efficiency or economy in the Service, or will otherwise be in the interest of the Service; or
(c) If the President or a Premier appoints him or her in the public interest under any law to an office to which the provisions of this Act or the Public Service Act, 1994 (promulgated under Proclamation 103 of 1994), do not apply.'

constitute misconduct and I have decided to institute a disciplinary investigation in this regard. You will be served with a Notice of Intended Suspension in due course."

5. In the light of the above please note that your contemplated discharge in terms of the provisions of section 35 (b) of the South African Police Service Act, 1995 is no longer under consideration.'

[9] The first applicant was on the same day, of receipt of the intention to institute disciplinary proceedings, served with the notice of the intention to suspend her. A further allegation which formed the basis for the intention to suspend the first applicant relates to the radio interview she participated in, on 12 August 2015 at Radio 702.

[10] The suspension of the second applicant is based only on the findings made by the Portfolio Committee on Police in Parliament which reads as follows:

- 'your conduct was obstructive, not forthcoming and deliberately obstructing the questions put to you;
- you are uncooperative with the Committee
- you attempted not to provide full answers to the Committee
- your role in the interactions and deliberations at the said Committee meetings has been to deliberately mislead the Committee as to who ordered you to release the press statement (s); and
- your actions were inconsistent with the rule of a high-ranking officer of your bank and status in the management echelon of SAPS.'

<u>The relief and the contention of the applicants</u>

[11] The basis of the relief sought in this matter is set out in the founding affidavit in the following terms:

a. The suspension ought to have been on the basis of precautionary measure pending the determination of the alleged misconduct in terms of Regulation 13 of the SAPS Disciplinary Regulations.
b. The interview with Radio 702 was a once off event and that any question about it can be done by visiting the recording based at the radio station and that the suspension came four months after the interview.

c. The alleged untrue statement contained in the affidavit before the Labour Court cannot sustain because the matter was never decided by the Court as it resolved by agreement.
d. The evidence relating to the finding by the Parliamentary Portfolio Committee is held by that Committee.

[12] Mr Mashaba, for the applicants contended that the suspension was invalid because it did not comply with the provisions of regulation 13 of the SAPS Regulations. He further contended that the suspension was motivated by ulterior motive. It was for this reasons that he contended that the suspension was invalid and unlawful. He conceded that the allegations made against the applicants especially those contained in the findings of the Portfolio Committee were serious. He, however contended that that could not serve as a valid ground for suspension because the report was a subject of a pending review challenge by the suspended National Commissioner of Police, Commissioner Phiyega. The other point he made in this regard was that the report was still in a draft form and further needed to be ratified by the Parliament.

Evaluation

[13] In my view the applicants have failed to make out case for urgency and it is for that reason alone that their application stands to fail. It is trite that in order to succeed an applicant who institute an urgent application must satisfy the requirements of rule 8 of the Rules of this Court. In this respect the application must in the founding affidavit set out the reasons for urgency and why the relief is sought on an urgent basis. The founding affidavit must further explain why the time frame set out in the rules should be abridged.

[14] The other requirement to satisfy in relation to urgency is to show that there are no other satisfactory remedies available to the applicant and that if the relief is not granted on an urgent basis the applicant will suffer irreparable harm.

[15] In the present matter the reason why the matter is urgent is set out in the founding affidavit in the following terms:

> ‘28 I submit hearing of this matter is urgent. Invalid and unlawful decision of the First Respondent continues to be of force until set aside.

29. The First Respondent's decision to suspend me has been taken for an ulterior motive. The reasons provided for the decision are clearly not authorised in terms of the Regulation 13 of the South African Police Service Disciplinary Regulations 2006.

30. We have been directed to hand over the SAPS 108 items. These include cell phones, laptop computer and our certificates of appointment.

31. On Saturday the 05 December 2015, Makgale received numerous phone calls from officials of the SAPS requesting that he hands over his SAPS 108 items.

32. All the above items necessary for the preparation of ensuing disciplinary hearing. Our rights to a fair hearing process will be undermined if the possession of the SAPS 108 items (are) taken away from us.'

[16] It is apparent from the above that the reason for urgency is based on the fact that the decision to suspend the applicants is invalid and unlawful because it 'continues to have force until set aside.' It is indeed correct that the decision carries force until it is set aside.[2] The fact that a decision is invalid and unlawful does not automatically make the matter urgent, as Mr Kennedy for the respondent argued. It does not relief the applicant of the duty of showing that the matter is indeed urgent. In other words even if it was to be accepted that the decision was unlawful, the applicants still needed to satisfy the Court as to why the decision could not be challenged through the normal time frames provided for in Rules of the Court.

[17] In light of the above I find that the applicants have failed to persuade this Court as why the alleged unlawful suspension could not be challenged through the normal time frames provided for in the Rules of the Court. The case of applicants is also not assisted by the call for returning the SAPS 108 items to the respondents. In the first instance those items are the properties of the SAPS, and secondly the call for the return of the items cannot form a basis for urgency for two reasons, namely that:

a. There is no evidence that the applicants have returned the items.
b. The complaint is based on the fear that taking away the items will hinder the applicants in their preparation for the disciplinary hearing. The

[2] The principle that an invalid and unlawful decision carries force until set aside is based on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and* Others [2004] 3 All SA 1 (SCA) (28 May 2004).

disciplinary hearing is still to be instituted and if the applicants require the items for preparation at that stage, they can then apply to the chairperson of the disciplinary hearing for their release.

[18] The other reason for finding that this matter is not urgent is because the applicants have failed to make out a case that they will not be able to obtain a satisfactory relief at a later stage and that if the relief is not granted on an urgent basis they will suffer irreparable harm.

[19] The issue of availability of other satisfactory remedy in suspension cases was dealt with in *MEC for Education, North West Provincial Government v Gladwell*,[3] where the Court found that in suspension cases the remedy is found in the provisions of s186 (2) of the LRA and therefore urgent relief would be inappropriate. The urgent relief in suspension cases would according to the Court apply where there exist reasonable apprehension of irreparable harm. In that instance an interim relief pending the finalisation of the unfair labour dispute would be the appropriate remedy. In this regard the Court per Murphy AJA had the following to say:

> "[46] Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of section 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings. (Footnote omitted)"

[20] In the present matter the applicants do not in their founding affidavit state what irreparable harm they will suffer if the relief they are seeking is not granted. In the

[3] [2012] 8 BLLR 747(LAC).

confirmatory and supporting affidavit the second applicant makes a broad and unsubstantiated averment that he will suffer irreparable harm if the relief is not granted on an urgent basis. The only harm that the applicants allude to is that they will not be able to prepare for the disciplinary hearing if they were to hand over the SAPS 108 items. As indicated earlier there is no evidence that they have handed the items to the respondents. Even if they had they have the option of applying to the chairperson of the disciplinary hearing to order that they be allowed access to them as soon as those proceedings commence.

[21] In light of the above I find that the applicants have failed to make out a case for urgency and accordingly their case stands to fail for that reason alone.

Merit

[22] Ordinarily I should have concluded the case on the basis of the above finding but I have decided to deal the merits for two reasons. The first being is that even if I was wrong in finding that the applicants have failed to make case for urgency, their case still fails on the merits. The second is for the purpose of applying the exception to the general policy of this Court that in general costs should not be awarded against individuals because they may have a chilling effect on individuals who may wish to assert their labour rights.

[23] It seems to me that the applicants in their claim that their suspension is unlawful misunderstood the cause of action which the first respondent took against them. They seem to treat suspension in the same way as a disciplinary inquiry. Although related the two processes are distinct from each other.

[24] As indicated earlier the applicants sought a final relief and therefore it was incumbent on them in order to succeed to satisfy the following requirements:

- a clear right to the relief sought
- proof that an injury or wrong was actually perpetrated or committed or reasonably apprehended by them; and
- the absence other satisfactory remedy.

[25] The basis of the relief sought by the applicants is set out at paragraph [11] of this judgment. In the founding affidavit the applicants focuses their complaint on the

charges and the evidence which is to be led at the disciplinary hearing. The issues relating to how evidence for the disciplinary hearing is obtained and where it is located has very little bearing on the validity and the lawfulness of the suspension. Those issues would become relevant once the investigation into the allegations have been completed, the charges formulated and the disciplinary proceedings having commenced. The fact that the alleged misconduct is committed in Cape Town and therefore the evidence relating thereto is locate there has no relation to the lawfulness of the suspension. The question of the location of the evidence, whether it be in the archives of Radio 702 or in Parliament in Cape Town, may well be a defence that they may be raise during the disciplinary hearing. Whether that would constitute sustainable defences is not a matter for this court to determine at this stage.

[26] It appears to me that one of the important thing which the applicants ought to have shown in their papers in order to succeed in their point about the allegations made against them, in particular those contained in the Portfolio Committee's findings was that they were innocent in as far that was concerned or that none of those never happened or if they concede that it happened, that they do not constitutes misconduct. Except for contending that the evidence relating to the findings of the Portfolio Committee is based in Cape Town the applicants did not dispute the allegations contained in the findings nor contended that they are innocent in as far as that was concerned.

[27] The other basis upon which the applicants attacks the decision to suspend them is on the alleged ulterior motive on the part of the first respondent. The ulterior motive is based on the averment that the decision to suspend was not authorised in terms of regulation 13 of the Regulations of the SAPS. There was initially some confusion as to whether the complaint about non-compliance with the regulation related to regulation 31(2) of the Regulations. Mr Matlhaba clarified in reply that the applicants' case was based on regulation 13(1) read with sub-regulation (3) and regulation 5 of the Regulations.

[28] Regulation 13 under the heading, "Precautionary suspension," envisages two kinds of suspensions, the one with pay and the other without pay.[4] It is clear that sub-

[4] Regulation 13 which reads as follows:
'**13. Precautionary suspension**

regulation (1) gives the National Commissioner very wide powers to suspend. Unlike sub-regulation (2) which provides for certain requirements to be satisfied in order to suspend an employee without pay, sub-regulation (1) is silent on that. Sub-regulation (3) simply states that; "A suspension is a precautionary measure."

[29] Regulation 5 which the applicants relied on in their submission is headed "Nature of misconduct."[5] This regulation deals with misconduct that may warrant disciplinary action against an employee. It has to be read with regulation 20 which deals with various misconduct which could be committed by an employee. It is clear that regulation 5 requires of the employer in charging an employee under any of the offences listed under regulation 20 to assess the seriousness of the misconduct taking

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(1) The employer may suspend with full remuneration or temporarily transfer an employee on condition, if any, determined by the National Commissioner.
(2) The National or the Provincial or Divisional Commissioner (the Commissioner) may suspend the employee without remuneration, if the Commissioner on reasonable grounds, is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in Annexure A and that the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed: Provides that –
    (a) Before suspending an employee without remuneration, the employee is offered a reasonable opportunity to make written representations;
    (b) The Commissioner considers the representations and inform the employee of the outcome of the representations;
    (c) The disciplinary process must be initiated within fourteen (14) calendar days of the date of the decision to suspend the employee without remuneration; and
    (d) If the disciplinary process is not completed within sixty (60) calendar days from the commencement of the suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the Commissioner must consider. The Commissioner must take any decision on continued suspension within seven (7) calendar days of receiving written representations on continued suspension and inform the employee of the outcome of the representations. A decision that the suspension continues, may only be for a further period of thirty (30) calendar days.
(3) A suspension is a precautionary measure.
(4) If any employee is suspended with full remuneration or transferred as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) calendar days from the commencement of the suspension or transfer. Upon the expiry of the sixty (60) days, the chairperson of the hearing must take a decision on whether the suspension or temporary transfer should continue or be terminated.

[5] Regulation 5 which reads as follows:
'**5 Nature of misconduct**
(1) Employee conduct that may warrant disciplinary action is listed in regulation 20.
(2) In applying regulation 20, the employer must assess the seriousness of the alleged misconduct after considering –
    (a) The actual or potential impact of the alleged misconduct on the work of the Service, the component of the employee, his or her colleagues and the public;
    (b) The nature of the work and responsibilities of the employee; and
    (c) The circumstances in which the alleged misconduct took place.'

also into account the impact that such misconduct would have on both the work of the employee and his colleagues.

[30] In my view regulation 5 has to do more with the consideration of whether an employee should be charged of any of the misconduct listed in regulation 20 of the Regulations. It may well be that the guidelines set out in that regulation may be applied by the employer when considering suspension of an employee. The seriousness of the alleged offence is always an important factor to consider when considering whether or not to suspend. In the present matter, Matlhaba conceded during the debate that the allegations contained in the findings of the Portfolio Committee were very serious.

[31] In my view regulation 5 has to do more with the consideration of whether an employee should be charged of any of the misconduct listed in regulation 20 of the Regulations. It may well be that the guidelines set out in that regulation may be applied by the employer when considering suspension of an employee. The seriousness of the alleged offence is always an important factor to consider when considering whether or not to suspend. In the present matter, Matlhaba conceded during the debate that the allegations contained in the findings of the Portfolio Committee were very serious.

[32] In light of the above I find that the applicants have failed to satisfy the requirement of a clear right to the relief sought. They have also failed to show that a wrong or injury was perpetrated against them by the respondents in suspending them. They have further failed to show that they have no alternative remedy but to approach this Court on an urgent basis.

[33] Turning to the issue of costs, I see no reason based on the facts and the circumstances of this case why costs should not follow the results. This is more so when regard is had to the fact that the applicants institute these proceedings despite clear jurisprudence on the approach to adopt when instituting an urgent applications concerning suspension.[6]

Order

[34] In the premises the applicants' application is dismissed with costs.

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[6] See *MEC for Education, North West Provincial Government v Gladwell, supra, Golding v HCI Managerial Services (Pty) Ltd and Others [2015] BLLR 91 (LC*) at paragraph [43] and *Maqubela v South African Graduate Development Association and Others [2014] 6 BLLR 582 (LC)* at paragraph [25].

E, Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. P Keneddy SC
Instructed by:	The State Attorney
For the Respondent:	Adv M Matlhaba
Instructed by:	Makgahlela Mashaba Attorneys.