REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 81/2017

In the matter between:

Dr Lesiba MOGOTLANE Applicant

and

Drs DIETRICH, VOIGT, MIA Respondent

and partners

Heard: 28 February 2017

Delivered: 6 March 2017

SUMMARY: Urgent application to uplift suspension pending determination of unfair labour practice dispute by CCMA; disciplinary hearing; and independent adjudicator process. Application dismissed with costs on urgency and merits.

JUDGMENT

STEENKAMP J

Introduction

[1] This urgent application has its genesis in South African race politics. The respondent, a pathology practice, resolved not to open the door to partnership for any white associates. A majority of its board resolved to reserve that decision. The applicant was the only board member to oppose the resolution. He disclosed information that was seen to be in breach of his fiduciary duties. He was also found to have abused his leave. After mediation, the parties reached an agreement. The respondent alleges that the applicant repudiated that agreement. It[1] placed the applicant on 'special leave' or suspended him. He seeks, in an urgent application, to have that suspension set aside pending the determination of an unfair labour practice dispute by the CCMA or a number of other processes.

Background facts

[2] The applicant, Dr Lesiba Mogotlane, is a medical practitioner and a pathologist. The respondent is a well-known pathology practice[2], practising as a partnership comprising 49 partners, most of them medical practitioners qualified to practice as pathologists.

[3] The applicant started working for the respondent as an assistant in 2010. He quickly rose through the ranks. In March 2011 he became an associate and in March 2013 he became a partner, working in the East London office. His wife and children moved to Cape Town in 2016. He requested a transfer to Cape Town but was told that it was not possible.

[4] At some stage in 2004 the respondent's board of governors had decided that no white associates would be allowed to become partners. They decided by a majority of eight to one, on 17 June 2016, to propose to the partnership that the moratorium be revoked. The applicant was the only board member to vote against the decision.

[1] I refer to the respondent, a partnership, as "it" rather than "they", even though it comprises a number of doctors.

[2] Commonly known as "PathCare".

[5] The applicant disclosed the decision to other black partners before the CEO had had the opportunity to communicate it. That was deemed by the Board to be a serious breach of trust.

[6] A dispute arose between the applicant and the respondent. It focused on two issues: allegations that he abused his leave, including allegations of a lack of diligence, honesty and integrity; and a breach of his fiduciary duties.

[7] From September to December 2016 the applicant was granted unpaid leave at his request.

[8] On 28 November 2016 a mediation process started to deal with the allegations against the applicant.

[9] On 9 December 2016, after a mediation chaired by André Oosthuizen SC, the parties signed an agreement. The material terms are that:

9.1 Dr Mogotlane apologises unreservedly "for the misunderstanding of his role versus that of the CEO in communicating or discussing" the proposal concerning the progression of associates to partnership;

9.2 Dr Mogotlane would stand down from the board of governors;

9.3 "After discussion of the details of the incident" [and after it had initially been recorded that he did breach is fiduciary duty] "the parties agree that there was no breach of fiduciary duty";

9.4 No further steps would be taken against Dr Mogotlane;

9.5 PathCare would implement a programme aimed at providing associates and partners with the necessary knowledge and skills regarding corporate governance.

[10] The part of the agreement that led to the current litigation reads as follows:

> "5. Dr Mogotlane agrees to relocate to the Vermaak / Pathcare practice operating in Centurion, Gauteng, for a minimum of 3 years (barring any operational needs requiring a change to this time period). Such relocation date is to be determined and agreed by not later than 16 January 2017 and it shall be governed by the following conditions:

5.1 Dr Mogotlane acknowledges a partnership advancement was accorded him by the partnership in return for his relocation to East London. Recognising that Dr Mogotlane spent three years in East London and in recognition of his relocation to Gauteng where he undertakes to commit himself to the growth of this practice, Dr Mogotlane will retain his partnership progression;

5.2 Mutually agreed arrangements between Vermaak and partners[3] and Dr Vuyo Keti[4];

5.3 Arrangements regarding the office at which Dr Mogotlane used to be based, and the duties he used to perform, until the time of relocation."

[11] The applicant forfeited 11 working days of leave in 2017.

[12] The agreement further contains the following dispute resolution clauses:

"7. The parties acknowledge that they have entered into this agreement as a result of a mediation process in which they participated, and that it is advisable to endeavour to resolve disputes which may arise from the implementation hereof by a similar process of mediation. The parties accordingly agree that should any dispute or difference of opinion arise between any of the parties hereto arising from the provisions of this agreement, which cannot be resolved after discussion between the parties to such dispute, then any such party may request that the dispute be referred to mediation under the auspices of a mediator agreed upon by such parties.

…

8. Should such mediation not resolve any dispute regarding the implementation of this agreement, such dispute shall be dealt with in terms of the applicable provisions of the October 2014 Partnership Agreement."

[13] Regrettably, the mediation agreement does not say what the "applicable provisions" of the partnership agreement are. That would lead to yet a further dispute.

[3] i.e. the Gauteng practice.

[4] The applicant's wife.

[14] The applicant has not moved to Centurion in terms of the agreement. The respondent says he refuses to do so; he says he was still "in discussion" with the CEO, Dr Douglass, when the respondent fired the next salvo.

[15] After the mediation, and since 19 December 2016, the applicant has been working in Cape Town at his request and as a temporary measure. He was given a microscope and was temporarily accommodated in an empty administrative office. In terms of the mediation agreement it was envisaged that he would move to Centurion by 16 January 2017. That has not happened. Instead, he asked and was granted an extension until 31 January 2017. Still he did not move.

[16] On 31 January 2017 the CEO (Dr Douglass) and another board member, Dr Izak Loftus, wrote to the applicant on behalf of the respondent. They recorded that he had been given until 31 January 2017 to make his decision and that he had not done so. They stated:

> "Please note that after discussion with yourself [*sic*] on Monday 16 January when you requested that we give you more time to make your decision by when you should be in Gauteng, Izak and I agreed that we could extend this but would need you to make your decision by Tuesday, 31st January. If you are not able to comply you would be in breach of the agreement with us.[5]
>
> As you are aware this mediated agreement was in an effort to accommodate your personal circumstances which we understand prohibit you from working in East London, the place where you are contracted to work as histopathologist.
>
> This offer was kindly made possible through discussion with the Vermaak practice.
>
> If you are unable to take this position up in Gauteng, and in view of the fact that we do not have any operational need for your services in the Western Cape at present, we will unfortunately have to institute the process to terminate your appointment as it is not in line with PathCare's operational requirements, which we have stated very clearly throughout the mediation process and thereafter."

[5] My underlining.

[17] The applicant did not respond to that letter, other than to address an email to Dr Douglass in these terms a week later, on 6 February:

> "I have spoken to my legal representatives and unfortunately they cannot meet today as they are still in discussion with me regarding my case. I have stressed and they do realize the importance of dealing with this issue amicably and expediently. In order for them to get a clearer picture of the situation and to advise me accordingly, the following documents were requested:
>
> 1. Please can you send me a copy of the employment contract and that partnership progression letter for East London.
> 2. A copy of the discrepancy between leave and Meditech sign on."

[18] On the same day, 6 February 2017, the respondent provided the requested documents and informed the applicant that he would be put on paid 'special leave' pending a disciplinary hearing and an investigation by an independent adjudicator in terms of the partnership agreement, as he had repudiated the mediation agreement by refusing to move to Gauteng as agreed. He was told not to contact patients, supporters or partners.

[19] The applicant's attorney, Barnabas Xulu, responded on his behalf two days later, on 8 February. The pertinent parts of the letter read:

> "4. According to our instructions, there is no 'existing dispute' as referred to in your letter. The only dispute that exists relates to our client's relocation to Gauteng. Our client has a right to refer this dispute to mediation in terms of clause 7 of the mediation agreement. Accordingly, this letter serves as formal notice of our client's referral of the dispute in relation to his relocation to mediation in terms of clause 7 of the mediation agreement. Your attempt to deny our client's right to do so by prematurely appointing an independent adjudicator is untenable. Our client's right in this regard are reserved.
>
> 5. As you know, all other disputes between our client and yourselves [*sic*] who settled in terms of the mediation agreement. This is specifically recorded in clause 1 thereof. What is more, clause 3 records that those steps of any nature will be taken against our client in relation to the disputes that were settled in terms of the mediation agreement. Your

attempt to resuscitate disputes that were settled by prematurely appointing an independent adjudicator and initiating disciplinary proceedings is unsustainable, unlawful and patently unfair.

6. With regard to our client's suspension from his employment, it is abundantly clear that such suspension is unlawful and unfair for at least the following reasons:

6.1 you failed to observe the *audi alteram partem* principle by not allowing our client a hearing and/or at the very least an opportunity to make written submissions before being suspended;

6.2 secondly, the alleged misconduct is not serious. The allegation to this effect in your letter does not make it serious. You have also not demonstrated in your letter hard the disciplinary process will impact on Pathcare's patients. You seem to appreciate this because he only referred to the 'potential impact' which in any event is not elaborated upon but remain [*sic*] a subjective perception;

6.3 thirdly, there is no objectively justifiable reason to deny our client access to the workplace based on the integrity of the pending investigation into the alleged misconduct; and

6.4 you have also not demonstrated any other factor that would place the investigation or interest of affected parties in jeopardy."

[20] The applicant's attorneys demanded that his suspension be uplifted with immediate effect; and said that, should the respondent not do so by 10:00 the next day (9 February 2017) they would urgently launch court proceedings.

[21] The respondent replied the next day, 9 February. Dr Douglass said:

"We submit that this matter is not urgent as discussions on these matters have been ongoing with Dr Mogotlane since at least 28 November 2016 and since furthermore Dr Mogotlane requested an extension of time in this matter to consider his options from 16 January to 31 January 2017 which was granted to him."

[22] On the same day, the applicant's attorneys referred an unfair labour practice dispute to the CCMA.

[23] On 14 February 2017 Dr Douglass wrote to the applicant's attorneys on behalf of the respondent. He said:

> "At the meeting with Dumisani Ndebele and myself [*sic*] on 1 February 2017, Dr Mogotlane made it clear that he was unable to move to Gauteng, and would therefore not be complying with its obligations under clause 5 of the mediation agreement. That is a repudiation of his obligations under the agreement.
>
> PathCare accepts that repudiation and accordingly regards the mediation agreement is hereby cancelled.
>
> If Dr Mogotlane disputes PathCare's right to cancel the mediation agreement, or dispute any other aspect relating thereto, kindly, by return, indicate:
>
> 1. The nature of the dispute; and
> 2. whether you contend that such dispute should be referred to mediation in terms of clause 7 of the mediation agreement."

[24] The applicant's attorneys replied on the same day. Their version of events was the following:

> "In in any event, it is our instruction that our client never '… made it clear that he was unable to move to Gauteng'. Instead, in the said meeting [of 1 February 2017] our client queried the tone of your letter dated 31 January 2017 (and the threats of the termination of our client's employment contained therein). Our client stated he would have to take legal advice on this matter. You then stated that the issue of the relocation must be dealt with expeditiously and you then offered to meet our client's legal advisers on certain dates to discuss the issue. You also offered to provide our client with the names of certain attorneys usually engaged by PathCare. Our client declined this offer. It was agreed that our client and his legal adviser would meet with you, by the latest, on 6 February 2017.
>
> In summary, our client was still in discussion with you regarding the issue of his relocation when he met with you and Dumisani Ndebele on 1 February 2017."

[25] What the letter does not say, is that the applicant is still prepared to move to Gauteng. Instead, his attorneys confirmed that "the only dispute that exists between the parties relate [*sic*] to our client's relocation." They

nevertheless agreed to the mediation with André Oosthuizen SC as mediator. They reiterated, though, that they would launch an urgent application to set aside the suspension.

[26] The applicant launched this application on an urgent basis on 16 February 2017. The respondent filed an answering affidavit on 20 February 2017. On 21 February 2017 the second mediation – arising from the alleged breach of the first mediation agreement -- proceeded before Tanya Golden SC [it appears that Oosthuizen SC was no longer available]. This application was initially said down for hearing in this Court before Rabkin-Naicker J on 23 February 2017. She was reluctant to hear the application while the mediation was ongoing and postponed it to the date of this hearing, 28 February 2017. Mediation broke down on 23 February 2017.

[27] On 24 February 2017 John Newdigate SC was appointed as independent adjudicator to deal with the disciplinary issues.

The relief sought

[28] The applicant seeks the following relief:[6]

> "1. Dispensing with the forms, time periods and manner of service provided for in the rules of court and directing that this application be heard on an urgent basis.
>
> 2. That, pending the completion of the disciplinary hearing and/or independent adjudicator processes, as contemplated in the respondent's letter dated 6 February 2017 and/or the final determination of the applicant's unfair labour practice dispute that is set down for con/arb on 7 March 2017, whichever is completed and/or determined the latest, the respondent is directed to immediately lift the suspension imposed on the applicant in terms of the said letter.
>
> 3. That, in the event that it opposes this application, the respondent be ordered to pay the costs of this application."

[6] The applicant filed an amended notice of application on the morning of this hearing on 28 February 2017.

Urgency

[29] The first issue to be considered in terms of the notice of motion is whether the application should be heard on an urgent basis.

[30] As Mr *Stelzner* pointed out, this Court recently restated the principles to determine if an application should be heard on an urgent basis in *AMCU v Northam Platinum Ltd*[7]:

> "What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and Others*[8] the Court referred with approval to the following *dictum* from the judgment in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[9]:
>
> '…. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'
>
> 'Similarly, *Maqubela v SA Graduates Development Association and Others*[10] dealt with the consideration of urgency as follows:
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> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent

[7] (2016) 37 *ILJ* 2840 (LC); [2016] 11 BLLR 1151 (LC) paras [21] – [22].

[8] (2015) 36 *ILJ* 1331 (LC).

[9] [2011] ZAGPJHC 196 at para [6].

[10] (2014) 35 *ILJ* 2479 (LC) para [32].

relief is necessary. As Moshoana AJ aptly put it in *Vermaak v Taung Local Municipality*:

'The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.''

[31] Mr *Stelzner* also referred to *Golding v HCI Managerial Services (Pty) Ltd*[11] in the context of a suspension where the employee was not given an opportunity to be heard before he was suspended:

"[41] Murphy AJA[12] has held that, when dealing with holding operation suspension (as in this case) as opposed to a suspension as a disciplinary sanction, the right to a hearing may legitimately be attenuated. That is so because, as in this case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimised. Secondly, the period of suspension often will be for a limited duration. In this case, Golding will only be suspended until the finalisation of the disciplinary hearing, envisaged to be in a week's time. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, Murphy AJA held that the balance of convenience in most cases will favour the employer.

[42] But in this case, Golding was not given the opportunity to make any representations at all before he was suspended. That may well be unfair in itself, despite the fact that he has been suspended on full pay and that it will be of a limited duration.

[43] However, he faces a further hurdle. That is that he has an alternative remedy. As Murphy AJA also pointed out in *Gradwell*:

'Section 186(2) of the LRA defines an unfair labour practice to mean inter alia any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee.

…

[11] (2015) 36 *ILJ* 1098 (LC); [2015] 1 BLLR 91 (LC) paras {41] – [44].

[12] in *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2033 (LAC); [2012] 8 BLLR 747 (LAC) paras [44] – [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 s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 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 when 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 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."
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> [44] In this case, the applicant does seek an order granting urgent interim relief pending the outcome of the unfair labour practice dispute that he referred to the CCMA. But he referred that dispute belatedly, one day before launching this urgent application. He has not taken any steps to have the arbitration before the CCMA expedited. And he has not shown any irreparable harm. The harm to his reputation that he is undoubtedly suffering will be vindicated if he attends the disciplinary hearing and it is found that it did not commit the misconduct complained of. He is not suffering any financial harm. The hearing is set to take place this week. Should he cooperate with the hearing, the suspension – and thus his reputational harm if he did not commit the misconduct – will be short-lived. He has not shown any exceptional circumstances why this Court should intervene, as required by *Booysen*.[13]"

[32] In this case, the Dr Mogotlane has referred an unfair labour practice dispute to the CCMA. It is to be heard next week (on 7 March 2017) in the form of a con/arb. That is his alternative remedy envisioned by the Labour Relations Act.[14] And it is an adequate remedy by way of which he can obtain redress on an expedited basis. In the short interim period – unlikely

[13] *Booysen v Minister of Safety & Security* (2011) 32 *ILJ* 112 (LAC) para [54].

[14] Act 66 of 1995.

to be more than a week – he is receiving full pay. That is different from the situation in late 2016 when he took unpaid leave of his own accord – apparently without concern to his dignity and reputation on which he now relies for urgent relief.

[33] Insofar as the applicant relies on the alleged damage to his reputation in the interim, he has not set out any factual basis for it. And as the Court remarked in *Zwakala v Port St John's Municipality*:[15]

> "The difficulty I have is that almost every suspension by reason of the investigation of allegations of misconduct would cause this type of prejudice. This does not make the matter urgent in the sense described above. Furthermore, urgency can surely not be created by "rumour mongering" and "unfounded allegations of embezzlement". Right thinking inhabitants of Port St. Johns must know, or ought to know, that a suspension pending further investigations is nothing more than that. Such further investigations may establish impropriety on the applicant's part. On the other hand they may not.
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> Bearing in mind particularly that the applicant's suspension is on full pay, he has in my view a perfectly adequate alternative remedy before the CCMA. Even if the suspension had been without pay, this fact would not have taken the matter much further - see *University of the Western Cape Academic Staff Union & Others v University of the Western Cape* (1999) 20 *ILJ* 1300 (LC) at 1304 E-F."

[34] The application is not urgent. But the applicant has in any event not satisfied the requirements for interim relief as set out in *Setlogelo v Setlogelo*[16]:

> "The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's *Institutes* where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established, is

[15] (2000) 21 *ILJ* 1881 (LC) paras [5] – [6].

[16] 1927 TPD 178 at 227 [Innes JA].

> open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party."

[35] I now turn to those requirements, as developed in subsequent cases.

Prima facie right?

[36] The applicant alleges that his suspension is both unlawful and unfair: unlawful because the underlying disciplinary issues had been settled and compromised; and unfair because he was not afforded an opportunity to be heard and the reasons for his suspension are without substance.

Unlawful suspension?

[37] Mr *Coetzee* argued that, in terms of the mediation agreement of 9 December 2016, all the disciplinary issues between the parties had been settled; the question whether he was refusing to relocate to Gauteng, as he had agreed to do in the mediation agreement, was a discrete and severable dispute that should be determined in a separate process. He argued that all other disputes had been settled in a compromise which had the effect of *res judicata*. He relied on the following passages from Christie's *Law of Contract in South Africa*:[17]

> "Compromise, or *transactio*, is the settlement by agreement of disputed obligations, whether contractual or otherwise. If an offer to settle in particular terms is not accepted, the offeree cannot treat an inseparable part of the offer as an acknowledgement of debt and sue on it.
>
> …
>
> To return to compromise generally, the effect of a compromise is the same as *res iudicata* or a judgment given by consent. It is an absolute bar to action on the cause of action compromised, but not, of course, on any claim not included in the compromise.
>
> …

[17] GB Bradfield, Christie's *Law of Contract in South Africa* (7 ed) pp 528 and 534.

> The effect of repudiation or breach of the compromise agreement will depend on the nature of the agreement. In the case of what McNally J , in *Nagar v Nagar,*[18] describes as a compromise pure and simple (that is, not subject to a suspensive or restorative condition) there can be no question of returning to the original contract. Action must be brought on the compromise. If the compromise of an action is not fully complied with, the remedy is not to continue with the previous action but institute a new action on the compromise, unless the defendant raises no objection to the former course. But a party who challenges the validity of the compromise is not obliged first to bring an action to set it aside before suing on the original cause of action. It may sue on the original cause of action and leave it for the defendant to plead the compromise as a defence, unless in the circumstances the claim is frivolous or vexatious.
>
> The parties may of course agree, expressly or tacitly, that the effectiveness of the compromise shall be conditional on its being carried out, or that the original cause of action shall revive if the compromise is not carried out. Depending on the nature of such agreement the compromise may fall away altogether when the original cause of action revives or the plaintiff might have the choice of proceeding on the original cause of action or the compromise."

[38] In this case, the parties reached an overall mediation agreement in the form of a compromise. As part of that compromise, the respondent agreed not to take any disciplinary steps against the applicant. The applicant, in turn, agreed to move to Gauteng and to forfeit eleven leave days. The relocation date was to be agreed by not later than 16 January 2017. He has not kept to the terms of the agreement. It does not appear to me that the different clauses in the agreement are severable. It is indeed a compromise in the sense of "give and take". If one party repudiates his part of the bargain, it is up to the other party to accept that repudiation and to cancel the agreement. That is what happened here.

[39] Mr *Coetzee* has also submitted that the appointment of an independent adjudicator in terms of clause 11 of the partnership agreement is inappropriate. That clause deals with the process to be followed in

[18] 1982 (2) SA 263 (Z) 268 E-H.

disciplinary matters. Instead, he says, the dispute should be dealt with in terms of clause 33, dealing with settlement of disagreements over the partnership agreement itself by way of arbitration. The latter clause seems to me to be inappropriate, as the underlying dispute is indeed of a disciplinary nature – that is what led to the mediation agreement in the first place. But such are the dangers of referring to "applicable provisions" without specifying them.

[40] In my view, the respondent's actions in accepting the applicant's repudiation of the agreement, and therefore to reinstate the process of appointing an independent adjudicator[19] to deal with the allegations against him, are not unlawful. It follows that his suspension (or putting him on 'special leave') is not unlawful either. It may still be unfair. I deal with that question next.

Unfair suspension?

[41] The applicant also claims that his suspension is unfair. He may be successful on that argument insofar as he was not given an opportunity to make submissions[20] before he was put on 'special leave'; but even then, he has an alternative remedy. He has already exercised his right to refer an unfair labour practice dispute to the CCMA. That dispute is due to be heard in less than a week. And he may also raise any objections to the process that has been followed – and indeed, his claim that the disputes other than his relocation have been settled by way of compromise – before the independent adjudicator, Newdigate SC.

[42] The leading case with regard to applications to interdict suspensions is that of *Gradwell.*[21] To repeat:

[19] As noted above, an independent adjudicator, Adv John Newdigate SC, has already been appointed.

[20] Cf *SA Post Office Ltd v Jansen van Vuuren* [2008] 1 BLLR 798 (LC) par [39]; *Mogothle v Premier, North West Province* [2009] 4 BLLR 331 (LC).

[21] *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2033 (LAC); [2012] 8 BLLR 747 (LAC) paras [44] – [46].

> "'Section 186(2) of the LRA defines an unfair labour practice to mean inter alia any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee.
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> …
>
> 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 s 191(1) of the LRA. .... A declaratory order will normally be regarded as inappropriate when 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 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."

[43] The applicant in this case has asked for interim relief pending the CCMA hearing; but that hearing is less than a week away, and he has not shown any extraordinary or compelling circumstances why the suspension should be lifted in the interim.[22] He stands to suffer no irreparable harm. He is being paid handsomely. And his claims on damage to his reputation and his "right to work" sound thin when he had no difficulty in staying away from work at his own request for three months in 2016.

[44] The applicant has not shown any *prima facie* right not to be suspended.

Irreparable harm?

[45] Any harm that the applicant may suffer is not irreparable. He is being paid. His claim of an unfair suspension will be dealt with in the appropriate forum (the CCMA) in less than a week's time. And, as I have stated above, his claim that he "cannot be deprived any further from participating in his chosen vocation" is flimsy when one considers that he chose not to

[22] See also *Booysen v Minister of Safety & Security* (2011) 32 *ILJ* 112 (LAC) para [54].

participate in that vocation for a period of three months from September to December 2016. And in any event, the situation is easily remedied: he should simply and unequivocally give effect to his agreement of 6 December 2016 to move to Gauteng.

Alternative remedy

[46] The applicant has an alternative remedy. It is the remedy prescribed by the LRA, i.e. con/arb at the CCMA regarding an alleged unfair labour practice in terms of s 186(1)(a) of the LRA. The con/arb is set down for next week. That is the appropriate alternative remedy.

Balance of convenience

[47] Whatever prejudice the applicant may suffer is of short duration and is limited. He is being paid handsomely. The only prejudice he relies on is that he is unable to work – something that he had no problem with when he chose not to work for three months. The respondent, on the other hand, suffers inconvenience and costly litigation because the applicant has not given effect to the agreement that was reached after a lengthy mediation process.

Conclusion

[48] The Court has a discretion whether to grant or refuse urgent interim relief. Apart from the application not being urgent, it is dismissed for the reasons set out above.

[49] Given my conclusion on the merits I need not deal with the respondent's application to strike out portions of the founding affidavit.

Costs

[50] Both parties asked for costs to follow the result. The respondent went further and asked for a punitive costs order. I do not think a punitive order is warranted, but I agree that the applicant should bear the costs of two counsel where so employed, given the urgent basis on which the

application was brought and the applicant's apparent unwillingness to abide by the terms of the settlement agreement.

[51] This application first served before Rabkin-Naicker J on 23 February. She postponed for two reasons: the applicant had only filed a replying affidavit and heads of argument that morning; and the mediation process before Golden AJ was underway. She reserved costs. There is no reason in law or fairness why the applicant should not bear those costs.

Order

The application is dismissed with costs, including the costs of two counsel where so employed, and including the costs of 23 February 2017.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	André Coetzee
Instructed by	B Xulu & partners Inc.
RESPONDENT:	Robert Stelzner SC (with him Rob Engela)
Instructed by	De Klerk & Van Gend Inc.