IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 1245/10

In the matter between:

FRANCE TEMEKI MABOKELA **Applicant**

and

MORETELE LOCAL MUNICIPALITY **Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. This is an unopposed urgent application in which the applicant, the respondent's chief financial officer, seeks to review and set aside the decision of the respondent's municipal manager to suspend the applicant on 11 June 2010.

2. The applicant also seeks an order requiring the respondent to consolidate all disciplinary proceedings pending against him in a single enquiry.

Background

3. The applicant had previously been suspended on 1st March 2010, pending a disciplinary enquiry. The applicant was furnished with details of the charges on the same day.

4. The enquiry did not proceed during March as originally scheduled owing to some points *in limine* being raised. The next date the enquiry will be sitting is 7 July 2010.

5. On 1 June 2010 the applicant's attorney notified the municipal manager in a letter that the applicant's period of suspension expired on 31 May 2010 "in terms of the Collective Agreements" between the employer and employee parties. It further advised that accordingly he would be returning to work on 3 June 2010.

6. On 3 June 2010, the municipal manager, also by letter, confirmed that the applicant should return to work on 7 June 2010. However, the mayor of the respondent took exception to the action of the municipal manager and issued a letter on 10 June 2010, advising that the decision to reinstate the applicant was an error. The reasons given by the mayor were that the applicant as a section 57 manager was not covered by the Bargaining agreement and that he had been charged in terms of Annexure A of the municipal code of conduct and,only in the alternative, under the collective agreement. The municipal manager then issued a letter to the applicant on the same date advising of the revival of his suspension in line with the mayor's instruction. The applicant remains suspended on pay and has not attended work since 11 June 2010.

7. The applicant's attorneys made representations to secure his re-admission to the workplace without success. After the respondent failed to accede to a request to

reinstate the applicant by 15 June 2010, the applicant then launched these proceedings on 18 June 2010.

The rights the applicant seeks to assert

8. The applicant seeks to set aside his suspension on a number of grounds. Firstly, he objects to the fact that he was suspended without being given an opportunity to make any representations before the decision to suspend him was taken. He alleges that this denied him a right to *audi alterem partem* and was also unfair. He also alleges that the municipal manager failed to comply with the respondent's Code of Conduct and ignored the procedures he had to follow. Alternatively, he effectively claims that the municipal manager simply acceded to the mayor's wishes and did not exercise his own discretion in reviving the suspension.

9. The applicant appears to rely, at least in part, on a provision in respondent's Code that states a suspension of an employee should not exceed three months. Although it seems the municipal manager must have accepted the correctness of this contention, no copy of the provision was attached to the founding affidavit. The only extract from the Code which was contained in the founding papers refers to the requirement that discipline should be effected fairly, consistently, progressively and promptly.

10. The applicant alleges that the prolonged extension is prejudicial to his reputation and job security and that there is no objective reason provided by the employer for its continuation.

The respondent's Code of Conduct

11. As stated, the only extract of the respondent's code made available to the court to which the applicant referred deals with the requirements of disciplinary action. I am not aware of any basis on which it can be argued that the act of suspending an employee on pay is tantamount to disciplinary action. It is often a prelude to disciplinary proceedings, as it was in this case, but is not the same as disciplinary action itself. Accordingly, the contractual requirement that disciplinary action should be fair, which is set out in the Code does not extend to cover the act of suspension with pay. However, there are other statutory provisions directly governing the applicant's suspension, which are addressed below.

The applicant's reliance on a right to fair administrative action

12. In the absence of a contractual right, the legal basis of the applicant's claim, must rest on a right to fair administrative action, or the requirement of legality. For the reasons which follow below the matter can be disposed of on the basis of legality rather than by considering the applicant's right to fair administrative action. In any event, the existence of the latter right is very doubtful in the light of the dictum of the Constitutional Court in ***Gcaba v Minister for Safety & Security & Others*** **(2009) 30 ILJ 2623 (CC)** to the effect that "a grievance raised by an employee relating to the conduct of the state as employer" which has "few or no direct implications or consequences for other citizens" does not amount to administrative action.[1] Consequently, it seems an administrative law remedy would not be available to the applicant, even though the LRA also does not provide a remedy for unfair action relating to suspension on pay, in terms of the ambit of an unfair labour practice as defined in section 186(2) of the LRA.

[1] At 2538-9, paras [63] to [69]

13. The applicant's attack on the decision to suspend him on the ground that the municipal manager did not exercise an independent discretion but simply kowtowed to the wishes of the mayor would also not be cognizable as an infringement of the right to fair administrative action, following the decision in *Gcaba*.

The legality of the applicant's suspension

14. Turning to the legality of the applicant's suspension, his claim for relief rests on firmer ground. It appears to be undisputed that the applicant is employed in terms of section 57 of the Local Government: Municipal Systems Act 32 of 2000, which deals with the employment of municipal managers and managers directly accountable to municipal managers. The employment of such persons is governed amongst other things by Regulations promulgated under the Municipal Systems Act.[2] Regulation 16 specifically governs precautionary suspensions and states:

> "16(1) The employer may suspend an employee on full pay if he or she is alleged to have committed a serious offence and the employer believes his or her presence at the workplace might jeopardize any investigation into the alleged misconduct or endanger the well being or safety of any person or municipal property; provided that before an employee is suspended as a precautionary measure, he or she must be given an opportunity to make representation on why he or she should not be suspended.
>
> (2) The employee who is to be suspended must be notified in writing, of the reasons for his suspension simultaneously or at the latest within 24 hours after the suspension. The employee has a right to respond within seven (7) working days.

[2] See (G,29089, RG 8521, GoN 805), 1 August 2006

(3) If an employee is suspended as a precautionary measure, the employer must hold a disciplinary enquiry within sixty (60) days form the date of suspension, provided that the chairperson of the hearing may extend such period, failing which, the suspension must be terminated in writing and the employee must return to full duty."

(emphasis added)

15. In terms of what transpired in this instance, regulation 16(1) was not complied with. That regulation sets out one of the pre-requisites for exercising the power of suspension which the executive authority must comply with. Accordingly, in suspending the applicant without complying therewith the respondent acted unlawfully. The harm suffered by the applicant is being deprived of his right to be heard before suspension is effected and not to be suspended unless this is done. There is no suitable alternative remedy available to giving direct effect to the right.

The consolidation of disciplinary proceedings.

16. The applicant also seeks an order compelling the respondent to hold a single inquiry into all the charges of misconduct brought against him. Two sets of charges were issued to the applicant on 1 March and 11 June 2010 respectively. From the wording of the mayor's letter of 11 June 2010, the charges contained in the letter are clearly intended to be added to the previous ones. There is nothing in the letter to indicate that they will not be part of the same inquiry already initiated against him.

17. Obviously, it is generally desirable that disciplinary proceedings should be conducted expeditiously and that charges should not be added on a piecemeal basis as the hearing proceeds. However, as the proceedings do not appear to have reached the stage where evidence is being led on the merits of the charges and everything indicates the charges will be considered in the same proceedings, the factual basis for the applicant's fear of piecemeal proceedings has not been established, irrespective of whether or not he could assert any rights in this regard.

Order

18. In the light of the above, it is ordered that:

18.1. the application is deemed to be urgent and non-compliance with the Rules of the court pertaining to the form and service of the application are condoned;

18.2. the decision of the respondent's municipal manager to suspend the applicant on 11 June 2010, was unlawful and is set aside;

18.3. the respondent must permit the applicant to return to work on the next working day following the date of this order, and

18.4. the respondent is ordered to pay the applicant's costs.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 22 June 2010

Date of Judgment: 24 June 2010

Appearances:

For the Applicant:

Advocate: C Prinsloo

Attorney: Moima & Associates Attorneys