

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1594/2006

In the matter between:-

MAHLOMOLA FRANCIS MOKAPANE

Applicant

and

PHUMELELA LOCAL MUNICIPALITY

1st Respondent

THE MUNICIPAL COUNCIL OF THE
PHUMELELA LOCAL MUNICIPALITY

2nd Respondent

THE MAYOR OF THE PHUMELELA
LOCAL MUNICIPALITY

3rd Respondent

HEARD ON:

10 AUGUST 2006

JUDGMENT BY:

H.M. MUSI J

DELIVERED ON:

24 AUGUST 2006

[1] This is an application for the review and setting aside of a decision of the second respondent to terminate the employment contract of the applicant. The background to the dispute is set out hereunder.

- [2] The first respondent is a local municipality established in terms of the provisions of section 12 of the Local Government: Municipal Structures Act 117 of 1998 read with section 2 of the Local Government: Municipal Systems Act 32 of 2000. The second respondent is the council of the first respondent through which the first respondent acts. The third respondent is the mayor of the first respondent who is cited herein in his capacity as such. I shall for the sake of convenience refer to the first and second respondents collectively as the municipality and to the third respondent as the mayor.
- [3] The applicant was employed by the municipality as Manager Finance with effect from 1 July 2003 on a five years term contract. A contract of employment setting out the terms and conditions of his employment was duly written but was never signed by the parties. However, it can be accepted that the terms set out in such unsigned document incorporating a disciplinary code were applicable to him. The applicant was

dismissed on 24 February 2006 by the decision of the municipality now under attack. The decision followed upon the conduct of a disciplinary enquiry that found the applicant guilty on charges of misconduct and recommended his dismissal.

- [4] The ground on which the applicant attacks the decision to terminate his employment contract is that a wrong procedure was followed in reaching it. It will be noted that the whole process was initiated by the municipal manager, who is the officer to whom the applicant was accountable. The municipal manager first appointed a prosecutor to investigate the allegations of misconduct and if there was substance in the allegations, to prosecute the applicant. He also appointed the person who presided over the disciplinary hearing. In doing so the municipal manager acted in terms of the disciplinary code provided for in the Collective Agreement concluded at the South African Local Government Bargaining Council (the SALGA code). This code is different from the disciplinary code that is provided

for in the written agreement of employment to which the applicant is subject (the employer's code). In terms of the latter code, the proceedings are initiated, not by the municipal manager, but by the mayor. Once the mayor has decided that a disciplinary enquiry must be initiated he refers the matter to his council for a decision and thereafter he acts on instructions of the council. He, and not the municipal manager, appoints a prosecutor and a presiding officer.

[5] The applicant's basic contention is that the municipality was bound to follow its own disciplinary code and that since it followed a wrong code, the whole process of terminating his contract was completely irregular and reviewable. I should mention at this juncture that it is not in dispute that the SALGA code was not applicable to the applicant.

[6] In opposing the application, the respondents raised *in limine* the issue of jurisdiction. In this regard, it is pointed out that the employer's code specifically refers to the rights that employees have under the Labour Relations Act 66 of 1995

(the LRA) which implies that an employee aggrieved by his/her dismissal must follow the dispute resolution mechanism of the LRA. Reference was made to clause 19(n) of the employer's code and it was contended that the applicant was bound to refer his dispute to either the SALGA Bargaining Council or the Council for Conciliation Mediation and Arbitration (the CCMA). Mr. Cronje, for the respondents, elaborated on this contention in argument and submitted that this court has no jurisdiction in the matter. He cited *inter alia* the cases of **WESTERN CAPE WORKERS ASSOCIATION v MINISTER OF LABOUR** [2006] 1 BLLR 79 (LC) at 80 H – J; **HLOPE AND OTHERS v MINISTER OF SAFETY AND SECURITY & 7 OTHERS** [2006] 3 BLLR 297 (LC) at 303.

- [7] In response Mr. Daffue, for the applicant, referred to section 157(2) of the LRA which confers concurrent jurisdiction on the Labour Court with this court in respect of alleged violations of constitutional rights arising *inter alia* from employment relations. He cited a number of judgments, reported and unreported, in this regard in support of his

submission that this court has jurisdiction. It is unnecessary to go into details in this regard, for Mr. Daffue then made it clear that the applicant's case was that the decision under attack is an administrative action as defined in section 1 of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) and is therefore susceptible to review under section 6 read with section 3 of that Act. Mr. Cronje then conceded that on that basis this court does have jurisdiction.

[8] I therefore proceeded to hear the matter on the basis that it is a review under PAJA in respect of which the jurisdiction of this court is beyond dispute. The first and foremost question therefore to be considered is whether the decision in question is an administrative action, for if it is not, then that will be the end of the matter.

[9] Now an administrative action is defined in section 1 of PAJA. Subsection (a)(ii) thereof is more relevant for present purposes, for we are here dealing with a decision of a municipality, which is an organ of State. The question is

whether it can be said that the municipality was “exercising a public power or performing a public function in terms of any legislation” when dismissing the applicant and whether such decision adversely affected the applicant’s rights and had a “direct, external legal effect”.

- [10] The part of the definition relating to whether the decision has affected the rights of any person can be left out of the reckoning since the applicant will clearly have been adversely affected. Moreover it will serve no purpose to deal separately with this part together with the part relating to whether the decision had a direct, external legal effect, in view of the views expressed by Nugent JA in **GREY’S MARINE HOUT BAY (PTY) LTD AND OTHERS v MINISTER OF PUBLIC WORKS AND OTHERS** 2005 (6) SA 313 (SCA) at par. 23 to the effect that the two qualifications in tandem merely serve “to emphasize that administrative action impacts directly and immediately on individuals”.

- [11] In my view, there are insurmountable obstacles in the way of

the applicant in this matter. Firstly, although it is the decision of the municipality to dismiss that is sought to be reviewed, the real target is the findings and recommendations of the disciplinary enquiry that preceded the decision. It will be noted that the municipal council merely endorsed the recommendations of the disciplinary tribunal. The gist of the applicant's complaint is that the entire disciplinary process was flawed because it was initiated and conducted in terms of the SALGA code instead of the employer's code. The applicant does not attack or challenge the findings of the disciplinary enquiry as such but rather the procedure by which the disciplinary enquiry was initiated, constituted and conducted. But one cannot separate the findings from the procedure of the disciplinary enquiry. If the procedure was fatally flawed, the resultant findings are tainted and invalid, if not a nullity.

[12] For all practical purposes what the applicant seeks is a review of the findings of the disciplinary tribunal. Two problems arise from this. Firstly, the chairman of the

disciplinary enquiry should have been joined, which has not been done. The application is therefore defective on the basis of non-joinder.

[13] Secondly, decisions/findings of domestic tribunals do not constitute administrative action as defined in PAJA. See **KLEIN v DAINFERN COLLEGE AND ANOTHER** 2006 (3) SA 73 (T) at 85 C – J. Incidentally this judgment was cited by counsel for the applicant in the additional heads of argument that he filed with the consent of counsel for the respondents after the hearing had been concluded.

[14] Now counsel for the respondents focused on the conduct of the disciplinary enquiry upon whose findings the impugned decision was based. He submitted that although the employer's code was not followed, there was nonetheless substantial compliance with its provisions, so that at the end of the day, the applicant received a fair hearing. Counsel pointed out the following: a non-partisan independent lawyer from outside the municipality was appointed to prosecute;

likewise the presiding officer was a non-partisan independent professional; the applicant was given proper notice of the disciplinary hearing; he was furnished with a comprehensive charge sheet and given a full opportunity to state his case, which he fully made use of. In short, counsel submitted that the *audi alteram partem* rule was applied and the principles of natural justice complied with.

- [15] Mr. Cronje also contended that though the municipal manager was not, in terms of the employer's code, the person designated to set up the disciplinary enquiry and appoint the prosecutor and the presiding officer, his whole conduct was endorsed and ratified by the mayor and the municipal council as well as the then Exco representative. In this regard counsel cited the judgment of my brother Hancke J in **MOLEFE v DIHLABENG LOCAL MUNICIPALITY AND OTHERS** 2003 (4) ALL SA 269 (O) at 278 c – 280 e. I understood the import of the submission made on behalf of the respondents to be that even if the decision in question were to be found to be an administrative action it is not

susceptible to review because it was not procedurally unfair.

[16] It will be seen from the above that counsel for the respondents did not specifically address the question of whether the decision in question constitutes administrative action as defined. Now even if one were to proceed on the assumption that the decision as such can properly be considered separately from the findings of the disciplinary enquiry on which it is based, still the decision is, in my view, not an administrative action and I now turn to discuss this issue.

[17] For his submission that the decision is an administrative action, counsel for the applicant referred to **GREY'S MARINE HOUT BAY (PTY) LTD AND OTHERS v MINISTER OF PUBLIC WORKS AND OTHERS**, *supra* and **PLATINUM ASSET MANAGEMENT (PTY) LTD v FINANCIAL SERVICES BOARD AND OTHERS; ANGLO RAND CAPITAL HOUSE (PTY) LTD AND OTHERS v FINANCIAL SERVICES BOARD AND OTHERS** 2006 (4)

SA 73 (WLD). Now in the **GREY'S MARINE**-case, Nugent JA following the comments referred to in paragraph [10] above proceeded to formulate the following broad definition of administrative action at paragraph 24:

“Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.”

This interpretation of section 1 of PAJA was followed in the **PLATINUM ASSET MANAGEMENT**-case, *supra*. In both cases it was found that the conduct or decision complained of answered to the definition aforesaid. The matter was put as follows in the **GREY'S MARINE**-case at paragraph 28:

“The Minister's decision was made in the exercise of a public power conferred by legislation, in the ordinary course of administering the property of the State, and with immediate and direct legal consequences (at least for Bluefin).....”

[18] The instant case is, on the facts, clearly distinguishable from the above cases. In this case the municipality was not carrying out its daily functions involving application of policy or law. It was acting in its capacity as employer in terms of a private contract with its employee. In my view, the instant case falls squarely within the set of facts that obtained in **CAPE METROPOLITAN COUNCIL v METRO INSPECTION SERVICES CC** 2001 (3) SA 1013 (SCA) and must be decided similarly. Now the latter case did not deal with the provisions of PAJA but rather with the provisions of the empowering section 33 of the Constitution. But, as was stated in **GREY'S MARINE**, *supra* at paragraph 28, there are “no grounds for distinguishing administrative action as contemplated by section 33 of the Constitution from administrative action envisaged by PAJA”.

[19] The **CAPE METROPOLITAN**-case involved cancellation by a municipal council of a contract with a service provider engaged by the council to collect levies on its behalf. The contract was cancelled on the basis that the service provider

had defrauded the council. The court expressed itself as follows and I can do no better than repeat the whole of paragraph 18:

[18] The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration

acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.”

See also **SAPU & ANOTHER v NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE**

SERVICE & ANOTHER [2006] 1 BLLR 42 LC especially at 55 I – 56 B.

- [20] It is noteworthy that the applicant wants to hold the respondents to the terms and conditions of the contract of employment, for he says that they should have proceeded in terms of the code provided for therein. The respondents, on the other hand, dismissed him precisely because they allege that he breached such contract by rendering himself guilty of misconduct. This typifies the matter as purely a contractual dispute relating to the employment relationship of the parties and has got nothing to do with the municipality’s public functions.

[21] The one judgment that may be said to support the applicant's

case is **NELL v MINISTER OF JUSTICE AND**

CONSTITUTIONAL DEVELOPMENT & ANOTHER [2006] 7

BLLR 716 (T) in which it was held that the decision of the

Director General of the Department of Justice and

Constitutional Development to dismiss a Senior Deputy

Master of the High Court was an administrative action. This

case is, however, clearly distinguishable from the instant

case. The applicant therein occupied a senior public office,

being employed as a public servant whose terms and

conditions of employment were governed by statute, namely,

the Public Service Act 103(P) of 1994 and the Public Service

Staff Code. In dismissing him, the Director General was

clearly carrying out his daily public administration functions

as head of the department. The facts in **POPCRU &**

OTHERS v MINISTER OF CORRECTIONAL SERVICES &

OTHERS [2006] 4 BLLR 385 (E) are distinguishable for

similar reasons.

[22] In the additional heads of argument filed after the hearing,

counsel for the applicant belatedly raises as an alternative a new ground. He submits that in the event of it being found that the decision to dismiss is not an administrative action, it should nonetheless be reviewed on the basis of the principles of natural justice. He cited **KLEIN v DAINFERN**, *supra* at 79 D – 83 F. It is trite that an applicant must stand or fall by his/her case as pleaded in the founding affidavit. The applicant pleaded a case founded on breach of the right to a procedurally fair administrative action under PAJA and that was the basis on which the matter was argued. Moreover such review would be that of the findings of the domestic tribunal on which the decision was based and the chairman thereof has not been joined as I have already indicated. For an example of which parties should be joined in matters of this nature, see the **POPCRU**-case, *supra*. In any event, I find myself in agreement with counsel for the respondents that there has been substantial compliance with the requirements of natural justice in this case.

[23] In conclusion, it should be noted that the employer's code

provides for a right of internal appeal or to refer the dismissal dispute to the SALGA Bargaining Council or the CCMA. The intention was clearly that an aggrieved employee like the applicant should follow the simpler and cheaper dispute resolution mechanism of the LRA. Indeed the applicant must have been aware of this when he initially referred the dispute to the Bargaining Council for conciliation. His explanation that he had taken such a step because of wrong legal advice sounds hollow. That was in fact the correct route to follow, in terms of which if conciliation failed, the matter would, as a dismissal on account of misconduct, have proceeded to arbitration and thereafter, if needs be, to the Labour Court for review. What the applicant has now done is to try to resolve a pure employment dispute by invoking constitutional issues and clothing it as an instance of procedurally unfair administrative action. Interestingly, in his papers the applicant was cautious to avoid using the term “unfair” preferring rather the word “unlawful” to describe the alleged administrative action. This is obviously because the word “unfair” evokes the notion of an unfair dismissal, which would

have suggested the applicability of the provisions of the Labour Relations Act. But then, as the saying goes, the applicant has made his bed. He must now sleep on it.

[24] The application is dismissed with costs.

H.M. MUSI, J

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On behalf of second to third
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