

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2217/20

In the matter between:

CITY OF JOHANNESBURG

Applicant

and

ADVOCATE L.F. MUDAU N.O.

First Respondent

MICHAEL BOIKANYO

Second Respondent

Heard: 26 January 2023

Delivered: 26 January 2024 (This judgment was handed down electronically by circulation to the parties on 26 January 2024.)

REASONS FOR ORDER

PHEHANE, J

[1] The applicant seeks the reasons for the order issued by this Court on 26 January 2023 dismissing its review application against the decision on appeal by the first respondent.

Background

[2] The second respondent was employed by the applicant as a security guard. He was summarily dismissed for having failed to disclose to the applicant at the time he was employed, that he had a previous criminal conviction.

[3] Following his dismissal, the second respondent lodged an internal appeal against his dismissal on the grounds that it was both procedurally and substantively

unfair. In essence, the second respondent alleged that the applicant failed to adhere to the principle of *audi alteram partem* before dismissing him from employment in that it failed to invoke and comply with its own disciplinary code and procedure which is binding on it and is contained in a collective agreement termed the “*South African Local Government Bargaining Council Disciplinary Procedure Collective Agreement*” (the disciplinary code). It is common cause that no disciplinary hearing was held prior to his dismissal.

[4] The first respondent was appointed as the chairperson of the appeal in terms of the provisions of the disciplinary code. On determining the appeal by the second respondent, the first respondent found that the applicant did not follow clause 7 of the disciplinary code. In the circumstances, he found that the dismissal was both procedurally and substantively unfair. He set aside the dismissal and ordered that the first respondent be reinstated and be afforded an opportunity to state his case in a disciplinary hearing that is formally constituted.

[5] The applicant brings this application to review and set aside the decision by the first respondent on appeal. The review application is accompanied by an application for condonation for its late filing.

[6] I have considered the condonation application and I am of the view that good cause has been shown for the late filing of the review application. In the premises, granted condonation for the late filing of the review application.

Grounds of appeal

[7] In its founding affidavit, the applicant states that the review is a legality review, alternatively, a review in terms of the Promotion of Administrative Justice Act,¹ further alternatively, a review at common law. Although the applicant does not specifically plead that its review is in terms of the provisions of section 158(1)(h) of the Labour Relations Act² (LRA), the content of the founding affidavit seems to suggest this. Then there are the applicant's heads of argument that state in

¹ Act 3 of 2000.

² Act 66 of 1995, as amended.

paragraph 5, that the review is in terms of section 158(1)(h) of the LRA. The grounds of review it would appear, are contained in paragraphs 24 to 30 of the founding affidavit under the narrow heading: “*Defects in the Appeal Outcome*”.³

[8] The grounds of review are that the first respondent’s findings are irrational or he exceeded his powers in several respects. In essence, the grounds of review are that the first respondent did not consider and determine the merits of the dismissal of the second respondent to its conclusion, thus did not ensure the expeditious resolution of the dispute. In addition, he exceeded his powers by reinstating the first respondent, as clause 17.10 of the disciplinary code does not provide for a remittal of the dispute. Furthermore, the applicant alleges that the first respondent failed to deal with the substantive fairness of the dismissal and incorrectly found that procedural and substantive unfairness overlapped.

[9] The first respondent opposes the review essentially, on the premise that there is no basis upon which to review the appeal outcome.

Evaluation

[10] The applicant does not deny that the disciplinary code and procedure is binding on it. It accepts that the first respondent was appointed in terms of the disciplinary code to determine the appeal.

[11] The first respondent sets out in great detail in his report containing the outcome of the appeal, what steps the applicant ought to have taken in terms of the disciplinary code to deal with the allegation against the first respondent. He determines the appeal in terms of the provisions of the disciplinary code. His decision is in terms of the provisions of clause 17.10 of the disciplinary code which reads thus:

³ See: Founding Affidavit at pp 8 to 10.

‘The presiding officer of the disciplinary appeal hearing shall have the power to confirm, set aside any decision, determination of finding and to confirm, set aside or reduce any sanction imposed by the presiding officer of the disciplinary hearing’.

[12] Although it is so, that there was no sanction imposed by a presiding officer of the disciplinary hearing as no disciplinary hearing was held, I find that the first respondent acted within the purview of clause 17.10 in setting aside the dismissal of the first respondent. His decision effectively gives the applicant the opportunity to “get it right” and follow the provisions of the disciplinary code. He is alive to the issue that there is a case that the first respondent is to answer and emphasises that the correct procedure as set out in the disciplinary code should be followed in so doing.

[13] In the circumstances, I find that the first respondent acted within the power granted to him in the disciplinary code. He considered the facts before him, the grounds of appeal and the provisions of the disciplinary code and made a decision in line with the disciplinary code as he was empowered to do. Therefore, his decision is rationally related to the purpose for which the power was given and his decision is not arbitrary, capricious or taken in bad faith or with improper motive.⁴

[14] In view of the afore-going, I find that the review is unmeritorious and that no case is made out on the applicant’s case as pleaded for in a legality review. In the premises, the review did not succeed.

[15] It is for these reasons that the review application was dismissed.

M. T. M. Pehane
Judge of the Labour Court of South Africa

⁴ *Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services* [2003] 4 BLLR 341 (LC).