

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 5403/2022

In the matter between:

O.R. TAMBO DISTRICT MUNICIPALITY

Applicant

and

PHENDULE MBEWU

Respondent

JUDGMENT

JOLWANA J

Introduction

[1] This is a self-review application in which the applicant seeks the review and the setting aside of a decision by its erstwhile acting municipal manager (Ms Mnyanda) to permanently withdraw disciplinary charges which had been preferred against the respondent by her predecessor. In seeking this relief, the applicant relies on the doctrine of legality.

Background.

[2] In November 2020 the respondent was one of the applicant's employees who allegedly participated in what the applicant regarded as an unprotected strike. He was

placed on precautionary suspension with no loss of benefits pending a disciplinary hearing that was to be instituted against him. The applicant's then-acting municipal manager (Mr Mase) constituted a disciplinary panel to deal with the matter. To this end, Mr Mase appointed the evidence leader and the presiding officer.

[3] The disciplinary hearing was scheduled to take place on 5 March 2021. However, it could not proceed and was postponed to the 11 and 12 May 2021. There were several other postponements about which details are sketchy and there is a dispute between the parties as to the reasons for the said postponements. On 5 October 2021, Ms Mnyanda wrote a letter to the respondent advising him that the respondent's disciplinary hearing and the charges preferred against him have, together with other matters, been considered. He was advised that consideration included taking a hard look at the issues involved, the implementation of the decisions of its management as well as council resolutions with a view to achieving good governance in the municipality. He was further advised that his disciplinary hearing did not progress resulting in the applicant losing appetite to proceed with it taking into account the time that elapsed since the charges were preferred against him. In the final analysis, the respondent was informed that the charges against him were permanently withdrawn and that his suspension was being lifted. He was thereupon directed to return to work.

[4] At the time of the withdrawal of the charges and the lifting of the respondent's suspension, the disciplinary panel constituted by Mr Mase had not heard any evidence nor had the respondent been asked to plead to the charges. Subsequent to the withdrawal of the charges Mr Mkize was appointed as the applicant's municipal manager on a long-term basis presumably on a five-year contract. On 07 December 2021, Mr Mkize wrote an email to the respondent advising him that the disciplinary hearing which had previously been scheduled for the 11 and 12 May 2021 was rescheduled for the 14 and 15 December 2021. It appears that when the disciplinary hearing was rescheduled for the 14 and 15 December 2021 Mr Mkize was not aware that his predecessor, the applicant's then-acting municipal manager, Ms Mnyanda had withdrawn the charges.

[5] The fact of the withdrawal of the charges was brought to Mr Mkize's attention by the respondent's Trade Union in a letter dated 9 December 2021. The respondent's Union further informed him that with the charges having been withdrawn, neither they nor their member would participate in the rescheduled disciplinary hearing. Mr Mkize responded to the respondent's Trade Union's letter advising it that the applicant did not have the power to interfere with the disciplinary process against the respondent which was being conducted as provided for in the applicable collective agreement. He further expressed the view that the withdrawal letter was not based on facts and was legally unsound for the respondent's case. He further said that it was in any event superseded by his own decision in his capacity as the applicant's municipal manager and accounting officer. He told the Union that the disciplinary hearing would accordingly proceed as scheduled.

[6] It is common cause that the respondent did not attend the disciplinary hearing on 14 and 15 December 2021. It therefore proceeded in his absence and according to Mr Mkize, the applicant's evidence was heard. The respondent was found guilty in absentia on five of the eight charges that were preferred against him. On 9 March 2022, Mr Mkhize wrote a letter to the respondent informing him of the outcome of the disciplinary hearing and the recommendations of the presiding officer. He thereupon terminated the respondent's services with immediate effect.

[7] The respondent was unhappy with his dismissal and referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the bargaining council). The matter was eventually set down for arbitration on 10 August 2022. At the commencement of the arbitration proceedings, the respondent's Union representative raised a point in *limine* contending that the charges in respect of which the respondent was dismissed had been withdrawn prior to his dismissal. Parties were directed to make written submissions on the point in *limine* subsequent to which a determination would be made. The commissioner delivered a ruling to the effect that the reinstatement of the charges was wrong in law and that the disciplinary proceedings of the 14 and 15

December 2021 were accordingly a nullity. He thereupon issued an order for the retrospective reinstatement of the respondent to his job together with his salary and benefits as if he was never dismissed.

The legality self-review.

[8] The applicant places much reliance, in the main, on section 55 (1) (g) of the Systems Act¹. Section 55 (1) (g) provides that in her/his capacity as head of administration of a municipality, the municipal manager is responsible and accountable for the maintenance of discipline of staff, subject to the policy directions of the municipal council². Mr Mkize further refers to the Disciplinary Procedure Collective Agreement (the DC Code), in particular, clause 1.2.11 thereof. The relevant provisions of the DC Code, in essence, proscribe any action that will have the effect of disrupting the operations of the municipality other than as provided for in the Labour Relations Act. In his founding affidavit, Mr Mkize makes the point that an identification process was undertaken resulting in the respondent being identified as one of the instigators of the unprotected disruptive strike which led to the respondent being charged with misconduct. He contends when Ms Mnyanda took the impugned decision to withdraw the charges, the decision taken by Mr Mase to subject the respondent to a disciplinary process was, contrary to the provisions of the DC Code, rendered nought.

[9] Therefore, so went the contention, the withdrawal of the charges undermined the applicant's fair labour practice rights which are enshrined in section 23 of the Constitution. It also made it difficult for a municipal manager to undertake her/his responsibility of maintaining staff discipline and promoting sound labour relations. Mr Mkize further contends that in acting as she did, Ms Mnyanda usurped the powers of the presiding officer of the disciplinary hearing thus disregarding the provisions of the

¹ Local Government: Municipal Systems Act 32 of 2000.

² Section 55 (1)(g) of the Systems Act provides that: As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for

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...

(g) the maintenance of discipline of staff.

DC Code which he says cannot be wished away or disregarded as it is the applicable legal prescript. He says that when the charges were withdrawn the presiding officer was still seized with the matter. Therefore, Ms Mnyanda acted *ultra vires* in her powers as the then-acting municipal manager at the time. He contends that Ms Mnyanda withdrew the charges without even seeking representations from the prosecutor or evidence leader so as to assess whether there was *prima facie* evidence against the respondent.

[10] The respondent's case is simply that the relief sought by the applicant is academic on the basis that the applicant's then accounting officer, Ms Mnyanda withdrew the charges levelled against him permanently and lifted his suspension. Therefore, with the charges having been withdrawn there was no case pending against him which could have been reinstated before a disciplinary hearing. He further contends that when on 7 December 2021 he received the notice that his disciplinary hearing was rescheduled for the 14 and 15 December 2021, it was already two months after the withdrawal of the charges and his reinstatement, and he had already returned back to work and was executing his duties.

[11] He contends that the disciplinary hearing that led to his dismissal on 9 March 2022, was unlawful and a gross miscarriage of justice which he challenged through the arbitration proceedings that took place at the bargaining council as an unfair dismissal dispute. The commissioner gave an award in his favour declaring that his dismissal was null and void and that the reinstatement of the charges was unlawful and reinstated him. The respondent further says that the commissioner's arbitration ruling remains extant as it has never been challenged in the Labour Court. On all of these bases, the respondent contends that the relief sought was both academic and incompetent.

[12] The respondent further raises a point in *limine* that Ms Mnyanda, in her capacity as the then acting municipal manager who took the decision to permanently withdraw the charges has a direct interest in the matter and should have been cited. Her decision was being challenged without her having been given a hearing. The respondent also challenges the relief sought by the applicant for the stay of any action or motion

concerning the dispute between the parties including the matter they said was before the bargaining council pending the outcome of this review application. The respondent contends that no action or motion proceedings are pending before the bargaining council. He says that a matter that was before the bargaining council was concluded and therefore the relief sought was incompetent. The respondent further challenges the appropriateness of the main relief in which the applicant seeks an order reviewing and setting aside its own decision taken on 5 October 2021 by Ms Mnyanda relying on the principle of legality. He contends that Ms Mnyanda, in her capacity as the acting municipal manager at the time, had the power to charge and subject the applicant's employees to a disciplinary process. Therefore, she also had the power to withdraw the charges after due consideration of whatever relevant factors were before her. In a nutshell, the respondent contends that all the relief sought by the applicant is incompetent.

The analysis

[13] The constitutional principle of legality on which the applicant places reliance in championing its case was well articulated during the early days of our constitutional democracy in *Fedsure Life Assurance*³ in which in a joint judgment of Chaskalson P, Goldstone J and O'Reagan J, the court said:

“[A] local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law....”

³ *Fedsure Life Assurance v Greater Council Johannesburg Transmisional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at 399 C-D.

[14] The applicant's case appears to be that the withdrawal of the charges against the respondent by Ms Mnyanda was not in accord with section 55 of the Systems Act or the applicable DC Code. Therefore, contends the applicant, Ms Mnyanda usurped the powers of the presiding officer of the disciplinary hearing who was still seized with the matter as he had not yet made any factual findings or determination on the charges that were pending before him. As I understand the argument, once a disciplinary hearing is set up by a municipal manager and its panel including its prosecutor and its chairperson is appointed, the municipal manager becomes *functus officio*. This is regardless of the fact that the charges so preferred by the municipal manager against an employee may not have been read to the employee and she/he may not have pleaded to them yet.

[15] The provisions of section 55 relevant to this matter are the following:

“(1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for—

(b) the management of the municipality's administration in accordance with this Act and other legislation applicable to the municipality;

(e) the appointment of staff other than those referred to in section 56 (a) subject to the Employment Equity Act, 1998 (Act 55 of 1998);

(f) the management, effective utilisation and training of staff;

(g) the maintenance of discipline of staff;

(h) the promotion of sound labour relations and compliance with applicable labour legislation.

(2) As accounting officer of the municipality the municipal manager is responsible and accountable for —

(a) all income and expenditure of the municipality;

(b) all assets and the discharge of all liabilities of the municipality; and proper and diligent compliance with the Municipal Finance Management Act.”

[16] The applicant contends that Ms Mnyanda’s withdrawal of the charges and the reinstatement of the respondent is a far cry from the maintenance of staff discipline, the promotion of sound labour practices or compliance by the municipality with applicable labour legislation. I understand this contention to be that the withdrawal of the charges was not rationally connected to the maintenance of staff discipline, the promotion of sound labour relations and ensuring compliance by the municipality with applicable labour legislation. Regrettably, there is no attempt by the applicant to explain these contentions. They are just put up without any indication of why they are made. It is not explained how the withdrawal of the charges by its then accounting officer Ms Mnyanda contravened section 55 of the Systems Act. It is also not explained how the withdrawal of charges would be antithetical to the promotion of sound labour relations with its employees.

[17] There is no indication of how many employees were part of what the applicant refers to as the unprotected violent strike and how many, if any other employees have been subjected to a disciplinary process and what the outcome was. In fact, the respondent appears to have been the only one subjected to a disciplinary process if regard is had to the charge sheet. Mr Mkize who deposed to the founding affidavit on behalf of the applicant baldly asserts that the respondent is not the only person whose charges were wrongly and unlawfully withdrawn by Ms Mnyanda. However, he does not state what he did regarding those other employees. He then makes an argument about the necessity for an injunction staying any proceedings emanating from Ms Mnyanda’s decision pending the finalisation of this self-review application.

[18] This averment is difficult to understand. On the one hand, it sounds as if it is some kind of a prayer for interim relief pending the review application. However, nothing is said about interim relief nor are its requirements traversed. On the other hand, if the decision of Ms Mnyanda as it related specifically to the respondent is the one sought to be invalidated in circumstances in which in the applicant's own mouth, the respondent was not the only employee whose charges were wrongly and unlawfully withdrawn by Ms Mnyanda, nothing is said about those other employees and they are also not cited. It is difficult to avoid the feeling that Mr Mkize is not being candid with this Court. He seems to be pursuing the respondent in a selective and possibly vindictive fashion, not on the basis of a well-founded belief or even advice that as a matter of law Ms Mnyanda in her capacity as the incumbent in the office of the municipal manager, had no power to withdraw any charges against any employees who were suspected of having committed misconduct.

[19] There are further difficulties with the applicant's reliance on the DC Code. First, the DC Code is silent on the power or lack thereof of the municipal manager to withdraw charges against employees. Second, the DC Code provides that an allegation of misconduct against an employee shall be brought to the municipal manager's attention. The municipal manager is empowered to consider the allegation and decide if he should institute disciplinary proceedings which he is enjoined to do only if he is satisfied that there is a *prima facie* case of misconduct. The suggestion that once a municipal manager decides to institute disciplinary proceedings against an employee and constitutes a disciplinary committee he becomes *functus officio* is difficult to understand. The contention that a chairperson of a disciplinary hearing who has not heard any evidence and no charges have been put against the employee who has yet to plead to them is somehow "seized" with the matter is equally problematic.

[20] Some of the problems with this proposition are the following. Were it to be true, it would mean that if the municipal manager becomes aware that the information which led to the charges being preferred against an employee was totally incorrect, unreliable or even false, he cannot withdraw the charges. This calls into question his own power

provided for in section 55 of the Systems Act to decide if, based on the information available to him he should prefer disciplinary charges against an employee. Furthermore, where an employee had been suspended and charges against him have been preferred he must continue paying that employee who is sitting at home on precautionary suspension waiting for the next date on which the hearing may have been set down or postponed. Furthermore, the disciplinary hearing process must convene just for the withdrawal of the charges that had not even been read to the employee who, as a result, had not even pleaded to them nor was any evidence tendered at that stage. The expenses involved in convening an unnecessary disciplinary hearing are contrary to the municipal manager's other obligations imposed on him by section 55 of the Systems Act, in particular subsection (2)(a).

[21] Subsections 55 (2) (a) and (c) provide in no uncertain terms that the municipal manager, as an accounting officer of a municipality, is responsible and accountable for all income and expenditure of the municipality. Furthermore, he is accountable for proper and diligent compliance with the Municipal Finance Management Act⁴. In this case, the prosecutor, and the presiding officer who constituted the disciplinary panel were Mayors from the Buffalo City Metropolitan Municipality and Amathole District Municipality respectively. Therefore, both of them were from outside the applicant's employment and jurisdiction. They would have to leave their workstations, make travelling arrangements with the attendant travelling expenses being incurred by the applicant, and travel hundreds of kilometres to attend to the withdrawal of the charges that were never put to the applicant. None of this makes any sense.

[22] Section 62(1) of the Municipal Finance Management Act (the MFMA) provides:

“(1) The accounting officer of a municipality is responsible for managing the financial administration of the municipality and must for this purpose take all reasonable steps to ensure –

⁴ Local Government: Municipal Finance Management Act 56 of 2003.

(a) that the resources of the municipality are used effectively, efficiently and economically,

...

(d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;"

[23] Absent specific legislative provisions, I do not see how not withdrawing the charges once the municipal manager decides that the disciplinary charges against an employee are no longer feasible or that it was no longer in the interest of good governance or sound labour relations in the municipality to continue with the charges when she is responsible for the financial administration of the municipality would be rational. I do not see how allowing the hearing to continue would amount to ensuring the effective and efficient use of municipal resources or the prevention of fruitless and wasteful expenditure by allowing the expenditure that would be incurred in convening the disciplinary hearing when there is no longer a need for that expenditure to be incurred. None of these scenarios are dealt with in the founding affidavit.

[24] There is another matter of some significance that Mr Mkize deals with rather glibly in his founding affidavit. I consider it necessary to recap the averments relevant to that relief to contextualise the point I am making in this regard. That issue relates to the relief for the stay of proceedings in an unidentified matter that he says is before the bargaining council. The evidence he placed before this Court in relation to that relief was that as a result of the hearing of the disciplinary proceedings in the absence of the respondent, the respondent was found guilty on five of the eight charges and a sanction of dismissal was effected on 09 March 2022. The respondent then referred an unfair dismissal dispute to the bargaining council. On 20 August 2022, the commissioner issued a ruling in terms of which it was determined that Ms Mnyanda acted within her powers in withdrawing the charges. The respondent sought a variation of the ruling on 7 October 2022 which was granted on 11 October 2022. Mr Mkize then makes the point that the variation happened within 4 days of being served with the variation application

when the applicant was still considering his options. He then contends that the haste with which the variation was sought and obtained leaves the applicant without any other recourse other than to seek a stay of any further process pending the finalisation of this review application. However, no interim relief was sought or granted by this court pending this review application. It remains obscure what the effect of this relief would be if it were to be granted together with the relief for the setting aside of the withdrawal of the charges.

[25] It is not clear why this Court was said to be the only option bearing in mind that the review of the bargaining council rulings and determinations is only justiciable before the Labour Court which in terms of section 142(11) of the Labour Relations Act⁵ is specially empowered to “*confirm, vary or set aside the findings of a commissioner.*” The applicant did not challenge the ruling of the commissioner on the respondent’s point in *limine* in any forum which therefore remains extant. The applicant just changed tack by coming to this Court to seek relief which if granted, would render the commissioner’s ruling nugatory without specifically challenging its validity. The absurdity of this whole approach is palpable.

[26] Section 158(1)(h) provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as the employer, on such grounds as are permissible in law. Axiomatically the Labour Court does have the power to deal with a legality review at the instance of an employer such as the applicant to review and set aside decisions taken by its own functionaries. In *Mohlomi*⁶ the court restated the legal position as follows:

“[33] There is no doubt that as a general proposition, the Labour Court has jurisdiction, in terms of Section 158 (1)(h) of the LRA to consider both the applicant’s application to review and set aside the 2016 resolution and the first

⁵ Act 66 of 1995.

⁶ *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* [2018] 4 BLLR 355 LC; (2018) ILJ 1096 paras 33 and 69.

respondent's application to review and set aside the 2013 resolution. The Court in *Gcaba v Minister of Safety & Security and Others* said that jurisdiction means:

'... the power or competence of a court to hear and determine an issue between parties ...'

And in *Merafong City Local Municipality* the Court held:

'Section 158(1)(h) of the LRA refers to a jurisdictional power of the Labour Court. It specifically provides that the Labour Court 'may review any decisions taken or any act performed by the State'. The only way the Labour Court is able to review is by hearing and determining an application for review of the acts and/or decisions contemplated in s 158(1)(h). That section should be read as not only conferring a power, but also jurisdiction upon the Labour Court.'

[69] Turning to the first respondent's counter application, it is of course true that the first respondent does not have the option available to it to resort to the dispute resolution processes under the LRA, as the applicant does. Applying the ratio in *Hendricks*, it would thus be competent for an employer in the public service, such as the first respondent, to approach this Court in terms of section 158(1)(h) to review and set aside decisions by functionaries that do not conform with the principle of legality. This would include seeking the review and set aside the 2013 resolution, in *casu*. There are in fact several examples of this Court reviewing and setting aside resolutions adopted by functionaries in the public service, on the basis of it being invalid, or null and void."

[27] Mr Mkize does not explain why he did not apply at the Labour Court for the review and setting aside of the commissioner's ruling. It seems to me that this would have been the most logical thing to do. Furthermore, he does not explain why he could not seek the same relief he now seeks before this Court in the Labour Court in circumstances in which the Labour Court has the power or competence to deal with

legality reviews. When the respondent raises the same issue Mr Mkize adopts a dismissive approach that it is not for the respondent to tell the applicant which forum to go to. That response is unhelpful as it does not address the issue or assist this Court in appreciating the applicant's reasoning.

[28] The possibility of an ulterior reason for seeking to avoid that court, absent an explanation which as I have said, has not been given, becomes even more real if regard is had to some aspects of the commissioner's ruling. There were some thought provoking observations by the commissioner regarding why he decided to deal with whether Ms Mnyanda had the power to withdraw the charges against the respondent as a point in *limine*. He expressed himself thus in his ruling:

“11. I decided to deal with this matter as a point in *limine* because it has elements of legal issues to be dealt with rather [than] the straightforward determination of the fairness or otherwise of a dismissal. These are:

- Whether the Acting Municipal Manager Ms N. Mnyanda acted ultra vires (beyond her powers in deciding to withdraw the charges levelled against the applicant) on 5th October 2021.
- It is not clear when the respondent's representative in his submissions states that the respondent is disputing the existence and authenticity of the withdrawal letter because this issue was never in dispute and parties agreed that the letter was prepared and signed by the Acting Municipal Manager.
- He further says that the reasons for such withdrawal as stated in the letter are based on misrepresentation, fallacy, lies, misleading and gross dishonesty. The author of this letter is the municipal employee and was not called by either the applicant to confirm or dispute the contents of the letter and this argument cannot be sustained.

- Whether the reinstatement of the charges through a notice sent to the applicant on the 7th of December 2021 was legitimate and correct in law.
- Whether the disciplinary enquiry of the applicant that was arranged and set on the 14th and 15th of December 2021 was null and void.”

[29] Some of these issues leave a lingering suspicion that in doing what may very well be forum shopping, the applicant’s reasons may not necessarily stand up to close scrutiny. In the bargaining council, it appears from the second and third bullet points above that in its submissions in that tribunal the applicant, as respondent then, tried to dispute the authenticity of Ms Mnyanda’s withdrawal letter. Furthermore, it tried to cast aspersions on Ms Mnyanda by making a submission that the withdrawal of the charges was based on misrepresentation, fallacy, lies, misleading and gross dishonesty. As the commissioner points out, Ms Mnyanda was an employee of the applicant when these submissions were made.

[30] It appears that the applicant has sought to make a somewhat different case in this Court which essentially is that Ms Mnyanda had no power to withdraw the charges. Before the bargaining council, it appears that the applicant was, in addition, singing a different tune arguing that Ms Mnyanda’s letter may not be authentic and that if it was authentic the author thereof made misrepresentations, was fallacious, lied and committed gross dishonesty. A bargaining council is a statutory tribunal and the applicant is an organ of state. For the applicant to be vacillating between two positions depending on which tribunal it champions its case in is troubling. This conduct is to be deprecated especially from an organ of State such as the applicant. While the applicant has annexed the bargaining council ruling in its founding papers it has not dealt with these disparate positions which it adopted at the bargaining council and in this Court.

[31] The seriousness and the undesirability of forum shopping by litigants were well expressed in *Gcaba*⁷ in which the Constitutional Court said:

⁷ *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at para 57.

“Following from the previous points, forum shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and systems of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered. One may especially not want litigants to “relegate” the LRA dispensation because they do not “trust” its structures to do justice as much as the High Court could be trusted. After all, LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments in Chirwa”

[32] There is another matter of grave concern relating to the applicant’s candour in approaching this Court. Whatever position Ms Mnyanda now holds in the applicant’s staff establishment, her appointment as an acting municipal manager has come to an end and a permanent municipal manager, Mr Mkize having since been appointed, there is no explanation why she has not filed an affidavit or why she is not participating on behalf of the applicant in these proceedings. Furthermore, there is no attempt by Mr Mkize to indicate to this Court if he sought an explanation from Ms Mnyanda and what her explanation for her decision was. This would have been very important because, while contrary to the respondent’s argument that Ms Mnyanda has a direct and substantial interest in this case, which is incorrect, her explanation, if one had been sought and obtained, would have been demonstrable of the applicant’s candour and a serious attempt to play open cards with this Court. If it was the case, as it was submitted at the bargaining council, that Ms Mnyanda misrepresented facts, lied, committed falsehoods and gross dishonesty in withdrawing the charges against the respondent, one would have expected that she would have been put through a disciplinary process as such conduct is no doubt serious misconduct, especially by a senior employee. I hope that the applicant was not attempting to mislead the commissioner in making those extremely serious allegations against its senior employee in order to sway the commissioner to grant the relief the applicant sought in that forum. For all the above reasons the relief sought by the applicant is incongruent, incompetent and is sought

without any sound factual or legal basis. The application must, in all the circumstances therefore fail.

The condonation application.

[33] Even if I am wrong in my conclusions above, there is another reason why the applicant's application cannot succeed. In its notice of motion, the applicant also seeks relief condoning the late filing of this review application and alternatively, an order declaring that there is no unreasonable delay. This prayer has not been drafted in a manner that enables an easy understanding of the relief sought in this regard. On the one hand, the applicant seems to accept that it is late hence the condonation application. On the other hand, it seeks a declarator that there was no unreasonable delay in the launching of the review application.

[34] The logical place to start is the applicant's pleaded case in the founding affidavit. Startling as it may be, the applicant does not deal with this relief in its founding affidavit at all. There are simply no averments that seek to deal with its condonation application. There are also no averments that deal with the aspect of that relief in which the applicant seeks a declarator that there was no unreasonable delay, none whatsoever. The respondent does make the point that the prayer for condonation should not be granted. The respondent's case in this regard is that the undue delay is glaring and that there is no sound explanation for the delay. To say that the applicant has provided no sound explanation is an understatement. The applicant has not given any explanation at all nor has it made any case that there is no unreasonable delay. This is problematic in light of the prayer for condonation which is set out in the notice of motion.

[35] Just to illustrate this point, the respondent deals with the condonation relief in paragraph 14 of its answering affidavit. Therein the respondent says that while the applicant seeks condonation it should not be granted for the reason of the shortcomings epitomised by the failure of the applicant to make a case for condonation and lack of a sound explanation for the delay in the applicant's papers. The applicant deals with its

condonation application for the first time in its replying affidavit but says nothing about lateness or condonation. At paragraph 24 of its replying affidavit, applicant has lumped paragraph 14 with five other paragraphs of the respondent's answering affidavit. At paragraph 27 which is where the applicant focuses on the issue of the delay it simply says that with regard to prayer 2, of its notice of motion which is where the applicant seeks the condonation relief, it denies that there is any delay. Nothing more is said about delay or in amplification of its contention that there is no delay.

[36] Under a group of paragraphs which are captioned "THE NATURE OF THIS APPLICATION" in its founding affidavit, the applicant makes the averment that its application being in the nature of a self-review, has been lodged within a reasonable time regard being had to the whole conspectus of facts. Nothing more is said nor is the conspectus of facts as would be relevant to either its application for condonation or its prayer for a declarator that there is no unreasonable delay is given. All of those facts as would enable the court to judiciously exercise its discretion in light of the amalgam of those facts as the applicant would have based its contentions on are conspicuous by their absence.

[37] It then contends that there is no need to seek condonation as the application was launched within a reasonable time from the date of the arbitration award. If that is so, I find it bewildering that the applicant has as one of its prayers, condonation. The arbitration award was delivered on 20 August 2022. The applicant instituted the review application on 03 November 2022. That is a period of about two months and two weeks from the 20 August 2022. What the applicant was doing for two and a half months before it instituted the review proceedings on 20 August 2022 is not explained. It is also not contended that that period was reasonable and why that is so, assuming the correctness of reckoning the review application date to be the date of the delivery of the arbitration award. That too is not dealt with. In other words, without pleading its basis for doing so, the applicant deals with the matter on the basis that the date of the delivery of the arbitration award is the correct date from which to determine the reasonableness of the period in which the review application could be launched.

[38] The decision sought to be impugned is the decision of the applicant's erstwhile acting municipal manager, Ms Mnyanda withdrawing misconduct charges against the respondent. It is common cause that that decision is embodied in Ms Mnyanda's letter dated 5 October 2021. It is further common cause that the applicant's current municipal manager and the deponent to its affidavits, Mr Mkize only became aware of that decision on 9 December 2021 on being informed in writing by the respondent's Union. The applicant has not explained or pleaded the basis on which at the very least the 9 December 2021 should not be the date on which reasonableness should be reckoned. An assertion that a party acted timeously must be based on facts alleged especially where relief is sought in the form of a declarator that it did not delay. Similarly, where a party feels that it may not have acted with the desired promptitude and on that basis, seeks condonation, it seems to me that such facts as are relevant to that relief must be pleaded.

[39] This is a general principle on the basis of which the *lis* between litigants as it concerns the issue of delay is adjudicated so that the court is in a position to identify the dispute it must resolve with reference to the pleadings. Whether or not a relief sought should or should not be granted must surely depend on the pleaded basis on which the prayer is sought. Failing a case being properly pleaded the basis on which the court should exercise its discretion becomes mysterious and foggy. That makes it difficult for the opposing litigant to know with some degree of certainty what the case is that it is required to answer. Similarly, it becomes difficult if not impossible for the court to exercise its discretion and to grant the condonation relief or find that there was no unreasonable delay.

[40] In *Molusi*⁸ the Constitutional Court was restating this fundamental principle of our adversarial adjudication system when it said:

⁸ *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) para 27-28.

“It is trite law in application proceedings the notice of motion and affidavits define the issues between the parties and affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:

‘If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties ... should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] ... must ... formulate his case sufficiently so as to indicate what he is relying on.’

The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

“A party has to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

[41] Needless to say for a court to reach a point where it determines that an application for review was moved within a reasonable time and therefore an application for condonation is unnecessary it has to do so based on facts averred and pleaded by the applicant. I just do not see how a court would have the wherewithal to conclude that the application was moved within a reasonable time or that it must exercise its discretion and condone lateness absent that issue being properly dealt with in the pleadings. It follows that a bald allegation that the application was launched within a reasonable time without the relevant factual matrix being pleaded cannot be correct.

[42] I am fortified in this view by what the Constitutional Court said in *Gijima*⁹. It said: “Khumalo also says that courts have a discretion to overlook a delay. Here is what we said:

‘(A) court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court’s discretion to overlook a delay.’

Tasima explained that this discretion should not be exercised lightly:

‘While a court “should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power”, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.’

From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter ...”

[43] The impugned decision was taken by Ms Mnyanda on 5 October 2021. Mr Mkize says he then became aware of it on 9 December 2021. In the founding affidavit, Mr Mkize makes it plain that he took the position that the defence raised by the respondent’s union and communicated to him on 9 December 2021 had to be raised in

⁹ State Information Technology v Gijima Holdings 2018 (2) SA 23 (CC) at page 39 C-F.

the disciplinary hearing. However, he does not deal with the fact that that is exactly what happened when the respondent raised that defence at the bargaining council and it was sustained. He does not explain why he did not, at the time he became aware of the impugned decision, consider whether his predecessor's decision to withdraw the charges was lawful or not or when and how he came to the conclusion that Ms Mnyanda had no power to withdraw the charges. He does not explain if he engaged with Ms Mnyanda who took the decision seeking to understand if and why that decision was taken as he seems to have doubted its authenticity, in juxtaposition to its validity before the bargaining council.

[44] The applicant is an organ of state with unlimited access to legal advice. That notwithstanding, Mr Mkize has taken another incomprehensible decision. That is the decision not to challenge the commissioner's ruling but instead to institute the review proceedings in a different forum while leaving the commissioner's ruling intact. It makes one doubt if the applicant even legitimately has difficulties with Ms Mnyanda's decision as against merely seeking to avoid the consequences of Ms Mnyanda's decision which has led to the reinstatement of the respondent.

[45] The sentiments expressed by the Constitutional Court in *Asla*¹⁰ are apt in this regard. It said:

“... A Court should be vigilant in ensuring that state self-review is not brought by state officials with a personal interest in evading the consequences of their prior decisions. It should scrutinize the conduct of the public body and its candour in explaining that conduct to ensure, in the public interest, open, responsive and accountable government. Where there is glaring arbitrariness and opportunism – that is, where the government actor's efforts to correct the suspected unlawful decision serve the antithesis of the rule of law – the interests of justice weigh against giving it a free pass by overlooking unreasonable delay.”

¹⁰ Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited 2019 (4) SA 331 (CC) at para 139.

[46] The facts which the applicant does not confront in its pleadings are briefly the following. The review proceedings were only instituted on 3 November 2022 which is more than 10 months after Ms Mnyanda's decision was brought to Mr Mkize's attention. That being the case, it seems to me that a detailed account of what the applicant was doing or why it did not immediately institute the review application should have been provided. That there was, at best for the applicant, a ten-month delay is clear. That delay was unreasonable, and it needed to be accounted for properly. The applicant's decision first to see if it would succeed before the bargaining council and only when it had lost in that forum and probably was less confident about being successful at the Labour Court, that it then left the commissioner's ruling unchallenged and now seeks a different relief in this Court is, at best, incomprehensible and clearly disingenuous and speculative.

[47] In *Kirkland*¹¹ Cameron J said:

"PAJA requires that the government respondents should have applied to set aside the approval, by way of a counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom courts must extend a procedure –circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

Conclusion.

¹¹ MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd 2014 (3) SA 481 (CC) at para 82.

[48] The applicant has failed to make out a case for condonation. It has also failed to plead the case for its prayer for the declarator that it launched the review application within a reasonable time. Therefore, its application for condonation for its failure to institute the review proceedings and/or a declarator that it instituted the review proceedings within a reasonable time must also fail. As I pointed out elsewhere in this judgment, the applicant has failed to make out a case for the review and setting aside of Ms Mnyanda's decision to withdraw the disciplinary charges against the applicant. Therefore, the application must, for that reason too, be dismissed.

[49] In the result, the following order is made:

1. The application is dismissed with costs.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant : Adv B. Metu
Instructed by : Nosindwa Attorneys Inc.
Mthatha

Counsel for the Respondent : Adv S. Mapekula
Instructed by : M Nzima Attorneys Inc.
Mthatha

Heard on : 18 April 2024
Judgment Delivered on : 16 July 2024