

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not reportable

Case no: JA42/2017

In the matter between:

MINISTER OF POLICE

First Appellant

NATIONAL COMMISSIONER OF POLICE

Second Appellant

and

MM KGOPA

First Respondent

LT COLONEL DE LANGE

Second Respondent

Heard: 24 May 2018

Delivered: 07 June 2018

Summary: *Locus standi* for the state to review its own decisions under section 158(1)(h) – Employee dismissed for misconduct – chairperson of the disciplinary hearing discharging the matter as the request of the employee.

Held: *Locus standi* - The law is settled. Section 158(1)(h) of the LRA empowers the Labour Court to review decisions of chairpersons at disciplinary hearings, at the instance of the employer, in circumstances where the State is the employer. Concomitantly, the State as employer has the standing to institute such review proceedings.

Held: Discharge - the decision of the chairperson was unreasonable and illegal. The whole point of a disciplinary hearing is to provide an employee an opportunity to respond to the allegations against him or her and to weigh the probabilities to establish if misconduct has been committed and what sanction might be appropriate. The Chairperson erred and acted unreasonably in treating the employee's version put in cross-examination as sufficient evidence and by accepting it as the more probable version. Appeal upheld and matter remitted for a hearing *de novo*.

Coram: Waglay JP, Jappie and Murphy AJJA

JUDGMENT

MURPHY AJA

- [1] This is an appeal against a judgment of the Labour Court (Everett AJ) dismissing the appellants' application to review and set aside a decision of the second respondent ("the Chairperson") in a disciplinary hearing discharging the first respondent ("Kgopa") from charges of misconduct and in which it held that section 158(1)(g) and/or (h) of the Labour Relations Act¹ ("LRA") does not permit the appellants to review the decisions of their own functionaries. The respondents do not oppose the appeal.
- [2] The issue on appeal is whether the appellants (and the State more broadly) have *locus standi* to review their own decisions under section 158(1)(h) of the LRA.
- [3] On 7 April 2012, Kgopa was charged with four counts of misconduct, including corruption. The charges stemmed from a series of alleged interactions with a member of the public ("Nonyane") who sought to lay a charge of fraud during January 2012. It is alleged that Kgopa had firstly advised Nonyane to open a case of robbery instead of fraud because his involvement in the alleged fraud constituted a crime and secondly demanded R1500 to open the case.
- [4] A disciplinary hearing was held on 16 and 17 May 2012 at which Kgopa pleaded not guilty to four counts of misconduct. The employer led three witnesses at the disciplinary hearing. Nonyane was the only witness who could, and did, speak to the events of January 2012. He testified that Kgopa had told him to change his charge and had demanded R1500 to open a case of robbery. Kgopa's version put to the employer's witnesses was that the money deposited into his account from Nonyane was in repayment for a loan. Nonyane denied this version. After the employer's evidence, Kgopa's representative applied for a "discharge".
- [5] The Chairperson granted the discharge on the basis that the evidence presented was essentially the evidence of a single witness who together with

¹ Act 66 of 1995.

the other witnesses had failed to give a good impression. The Chairperson placed significant emphasis on the balance of probabilities and stated:

“The balance of probabilities must be tested in all courts from here upwards up to the constitutional court. And the requirements from the court to test these cases, the court would want to see if there is fairness that table work on facts or that they work on fabrication, that they work on assumptions, perceptions and I must really tell you that there is not enough to come and say there is any balance to the employer’s side more than to the employee’s side. And therefore to call the employee so that the employer can get more balance into his side of the scope would probably not happen.”

Thus, she engaged in a balancing exercise in relation to the evidence before there was any evidence from Kgopa to weigh in the balance.

- [6] On 19 December 2012, the appellants instituted review proceedings in terms of section 158(1)(h) of the LRA in the Labour Court against the Chairperson’s ruling and sought orders reviewing and setting aside the decision absolving Kgopa from giving evidence in his own defence on the charges preferred against him and referring the matter back either to proceed *de novo* before another Chairperson or for the disciplinary hearing to proceed on the basis that the application for discharge at the close of the employer case was refused.
- [7] The appellants maintained that the Chairperson applied the incorrect test in determining whether “to grant absolution from the instance”. Instead of determining whether there was sufficient evidence on which a reasonable man might find for the employer, the chairperson balanced the probabilities of the employer’s version against that of Kgopa’s version, even though Kgopa had not testified. They also contended that the Chairperson’s ruling was vitiated by an error of law because a significant portion of her ruling was based on adverse credibility findings. As a consequence of these irregularities, and because the Chairperson’s decision constituted administrative action, the appellants’ contended that the ruling stood to be set aside on the bases that it was grounded on an error law, unlawful; unreasonable; procedurally unfair; and constituted a gross irregularity.

- [8] The review application sought to review and set aside the Chairperson's decision "to grant absolution from the instance" in Kgopa's disciplinary hearing. However, in fact, the Chairperson never granted absolution from the instance. She dismissed the charges against Kgopa, after Kgopa's representative applied for a discharge. Chairpersons presiding in SAPS misconduct disciplinary hearings are empowered to grant a discharge in terms of the Regulations of the South African Police. There was, therefore, no ruling founded upon an absolution from the instance to be reviewed.
- [9] Without realising that the Chairperson had actually discharged Kgopa, the Labour Court held that absolution from the instance is not appropriate in the context of disciplinary enquiries. The error is understandable in that the appellants had in their notice of motion sought review of the assumed decision to grant absolution. Be that as it may, the review application was dismissed on the basis that the appellants lacked standing to review the decision of the Chairperson. The Labour Court held:

'Section 158(1)(g) provides for the review of "any function provided in this Act". A disciplinary enquiry – other than an enquiry by arbitrator provided for in terms of section 188A – is strictly not a function provided for in this Act. And if it were it would result in the outrageous situation that the conduct of employers or chairpersons might be taken directly on review in the Labour Court, bypassing the conciliation and arbitration provisions of the LRA.

Section 158(1)(h) provides for the review of "any decision taken or any act performed by the State in its capacity as employer". This provision exists to ensure fair treatment by the State towards its employees and to avoid the abuse of State power. It does not exist to provide the State with an opportunity to review the functions of its own functionaries who, when they perform their functions, do so on behalf of the State. The State's attempt to review the chairperson it appointed for bias in favour of the first respondent, is similarly absurd.'

- [10] The judgment, if correct, would as a general rule preclude the State as employer from reviewing the decisions of its own functionaries in the context of erroneous rulings by disciplinary chairpersons presiding over disciplinary

hearings for misconduct. The judgment, however, stands in contradiction with the decisions of this Court which hold that a state functionary, such as the appellant, can review the decisions of its own functionaries.

- [11] Section 158(1)(h) of the LRA provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law. In *Hendricks v Overstrand Municipality*², this Court was invited to determine whether the Labour Court has the power to review the decision of a presiding officer of a disciplinary hearing at the instance of the employer, where the employer is the State. Relying on the decision of the Supreme Court of Appeal in *Ntshangase v MEC for Finance KZN*³ it held:

‘The Labour Court has the power under section 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the constitutional requirements of the principle of legality, such being grounds permissible in law.’

- [12] Thus, the law is settled. Section 158(1)(h) of the LRA empowers the Labour Court to review decisions of chairpersons at disciplinary hearings, at the instance of the employer, in circumstances where the State is the employer. Concomitantly, the State as employer has the standing to institute such review proceedings. Everett AJ’s finding that section 158(1)(h) “does not exist to provide the State with an opportunity to review the functions of its own functionaries who, when they perform their functions, do so on behalf of the State”, is therefore wrong in law and stands to be set aside.

- [13] However, the learned acting judge was correct in finding (in effect) that the decision of the chairperson was unreasonable and illegal. As she stated, the whole point of a disciplinary hearing is to provide an employee with an

² [2014] 12 BLLR 1170 (LAC) at para 29

³ *Ntshangase v MEC for Finance Kwazulu-Natal and Another* 2010 (3) SA 201 (SCA).

opportunity to respond to the allegations against him or her and to weigh the probabilities to establish if misconduct has been committed and what sanction might be appropriate. It was unreasonable for the Chairperson merely to have weighed the employer's version (which established *prima facie* misconduct) against the employee's version put to the witnesses in cross-examination. The employee was required to testify to rebut the *prima facie* case against him, or alternatively to close his case, in which event the Chairperson would have been required to assess in accordance with the applicable rules of evidence whether the unanswered evidence sufficiently established the misconduct. The Chairperson erred and acted unreasonably in treating the employee's version put in cross-examination as sufficient evidence and by accepting it as the more probable version.

[14] For those reasons, the matter must be remitted to a disciplinary enquiry *de novo*. However, the chairperson of the *de novo* hearing should be permitted to admit into evidence the record of the proceedings before the second respondent without recalling the relevant witnesses unless any of the parties on application seeks leave to do so.

[15] The following orders are made:

15.1 The appeal is upheld and the judgment of the Labour Court is set aside.

15.2 The decision of the second respondent dated 17 May 2012 is set aside.

15.3 The disciplinary proceedings against the first respondent are remitted to the second applicant to proceed *de novo* before another Chairperson who shall be permitted to rely on the record of evidence before the second respondent together with any additional evidence adduced by the parties before him or her.

JR Murphy AJA

I agree

B Waglay JP

I agree

A Jappie AJA

APPEARANCES:

FOR THE APPELLANT:

Adv N Muvangua and Adv V Bruinders

Instructed by: The state attorney

FOR THE FIRST RESPONDENT:

No appearance