THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 548/2018

EMALAHLENI LOCAL MUNICIPALITY **Applicant**

and

MONTY SIBANYONI N.O **First Respondent**

MARVELLOUS B SHONGWE **Second Respondent**

Heard: **7 May 2019**

Delivered: **17 May 2019**

Summary: **Application to review outcome of an internal disciplinary hearing.**

JUDGMENT

PRINSLOO, J

Introduction

[1] In this application, the Applicant seeks an order reviewing and setting aside the outcome of a disciplinary hearing insofar as it relates to the sanction and for the substitution of the sanction with an order dismissing the Second Respondent (the Respondent).

[2] The application for review was filed on 10 April 2018 and it was served personally on the Respondent on the same date. It was also served on SAMWU, that represented the Respondent during the disciplinary proceedings. On 20 June 2018 the transcribed record was served on the Respondent personally.

[3] On 18 July 2018, the Applicant filed a supplementary affidavit, which was also served on the Respondent. The Respondent had not filed a notice of intention to oppose or an opposing affidavit and on 10 December 2018, the Applicant filed a notice in terms of Rule 22B of the Rules of the Labour Court to enrol the matter for hearing on the unopposed motion Court roll.

[4] The Rule 22B notice was served on the Respondent and SAMWU on 10 December 2018.

[5] The matter was enrolled for hearing on the unopposed motion Court roll of 7 May 2019. At the commencement of the hearing, Mr Phiri of SAMWU requested that the matter be postponed in order for the Respondent to formally oppose the application.

[6] Mr Mokgotho on behalf of the Applicant opposed the request for a postponement.

[7] I canvassed with Mr Phiri as to what was the reason for the late request to postpone the matter as well as the basis for such a postponement in circumstances where the papers were properly served on SAMWU but no notice of intention to oppose, let alone any opposing papers were filed. In short; Mr Phiri had to convince this Court that there was a valid reason why a notice of intention to oppose was not filed and why a postponement should be granted at this late stage.

[8] Mr Phiri submitted that the reason why no opposition was entered and why the Respondent should at this late stage be granted a postponement in order to oppose the application, was because the legal team who handled the matter was suspended. Mr Phiri provided me with a letter of suspension, in support of his argument that the legal team who assisted the Respondent was suspended and that for that reason, the application was not opposed. It is evident from the letter of suspension that Mr Phiri handed up, that one Mr A Nthako was informed on 26 April 2019 that his suspension would be effective from 2 May 2019.

[9] The letter of suspension was of no assistance to the Respondent. This review application was served on the Respondent on 10 April 2018. It was also served on SAMWU. On 20 June 2018, the transcribed record was served on the Respondent personally. A supplementary affidavit was served on the Respondent on 18 July 2018. On 10 December 2018, the Applicant filed a notice in terms of Rule 22B to enrol the matter for hearing on the unopposed motion Court roll, which notice was served on the Respondent and SAMWU on 10 December 2018.

[10] It is evident from the Court file that the Respondent was notified about the set down of the matter on 14 March 2019. If the now suspended Mr Nthako was the union official responsible for the Respondent's case, his suspension only took effect on 2 May 2019, more than one year after this application was served and filed and almost five months after the Rule 22B notice was served.

[11] Having considered the application for postponement and the submissions made in opposition thereof, I refused the request to postpone the matter. There was simply no convincing reason presented to me as to why the matter should be postponed at the eleventh hour. It was evident that the Respondent and SAMWU were aware of this application as early as April 2018, but did nothing for more than a year to oppose the matter and when the matter was set down for argument, presented nothing but an unacceptable reason to postpone the matter.

[12] I have considered the prejudice to be suffered by the Applicant should a postponement be granted and in view of the nature of this application, I am satisfied that the Applicant would be severely prejudiced should the matter be postponed. I will fully deal with the nature of the application *infra*. Suffice to say that the Applicant will be unduly prejudiced in circumstances where it had to wait for a Court date for a period of more than one year, and should the matter be postponed, the Applicant will have to wait for another year or more to have the matter adjudicated in circumstances where the Applicant seeks to review and set aside the outcome of an internal disciplinary hearing.

[13] The application for postponement was refused and the matter proceeded on an unopposed basis.

Background facts

[14] The Applicant employed the Respondent on 1 June 2014 as an Assistant Manager: Public Facility Maintenance, Roads and Storm Water in the Municipality's Technical Services Department.

[15] On 22 November 2017, the Respondent was charged with five counts of misconduct and an internal disciplinary hearing, chaired by the First Respondent (the chairperson), was held on 28 November, 4 December 2017, and 17 and 23 January 2018. The Respondent was found guilty on charges 1 and 2.

[16] Mr Phiri as the Respondent's representative made submissions in mitigation and the Applicant made submissions in aggravation for purposes of the imposition of an appropriate sanction.

[17] On 21 February 2018, the chairperson issued a 'disciplinary outcome report' wherein he imposed the sanction of demotion to a position one level below that of Assistant Manager.

[18] It is this sanction of demotion that the Applicant seeks to review and set aside.

The disciplinary proceedings:

[19] The Respondent was found guilty on the following two charges.

> 'Charge 1:
>
> You are alleged to be guilty of breaching Schedule 2, Item 2(a) of the Municipal Systems Act 32 of 2000 in that:
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> It is alleged that during the week 30 May 2016 to 4 June 2016 you failed to loyally execute the lawful policies of the Municipality when you instructed Council employees to work for a contractor and wilfully endangered their safety.

Charge 2:

You are alleged to be guilty of breaching Schedule 2, Item 2(d) of the Municipal Systems Act 32 of 2000 in that:

It is alleged that you have failed to act in the best interest of the Municipality and in such a way that the credibility and integrity of the Municipality are not compromised when you colluded with business companies that have a direct interest in the projects that you were managing'.

[20] In the outcome report, the chairperson analysed the evidence and found that there was no doubt that a mutually beneficial relationship existed between the Respondent and one Mr Mashigo, the owner of Shaya company that was contracted by the Municipality to patch potholes and clean catch pits. At the centre of this issue was the awarding of Municipal contracts and the payment of kickbacks.

[21] The chairperson further found that one Mothapo and Mashiloane both used Municipal equipment to assist a contractor in a project to patch potholes around Duvha. He held that it was never disputed that the Respondent was responsible and accountable for the projects and his failure to discipline Mothapo made him complicit in the abuse of Municipal resources and for that, he should be held accountable.

[22] The chairperson found that the Respondent instructed his subordinate, Zimu, to sign a completion certificate for an incomplete project assigned to Mabakazi, in which the Respondent had a vested interest and this conduct amounted to an abuse of authority and corruption. The contractor was indeed paid for incomplete work and the chairperson found that the Respondent manipulated the working procedures and his subordinates by colluding with contractors for his own selfish ends.

[23] In conclusion, the chairperson found that the Respondent was 'hell bent in furthering his interests acting in cahoots with contractors' and that his conduct indeed amounted to an act of collusion.

[24] The Applicant presented submissions in aggravation to the effect that the employment relationship has broken down due to the gravity of the misconduct and the fact that the misconduct the Respondent was found guilty of, related to collusion, corruption, abuse of authority and overall had an element of dishonesty. The Applicant's case was that the misconduct was serious and that the relationship had broken down to the extent that dismissal was justified. A further aggravating factor was that the Respondent occupied a senior position, he was entrusted with contracts worth hundreds of thousands of Rands and the person occupying his position, must be trusted to deal with the contracts and contractors, which was in the Respondent's case, no longer possible.

[25] The Applicant submitted that dismissal was the only appropriate sanction in circumstances where the Respondent could no longer be trusted because of fraud, collusion and gross dishonesty.

[26] The Respondent made submissions in mitigation to the effect that he does not have any previous record of misconduct, he is an 'academic person' and therefore a great asset to the Municipality and he is the only breadwinner and father of four children who depend on him. In addition, the Respondent made factual submissions in response or in defence to every finding made by the chairperson. The Respondent submitted that a written warning would be an appropriate sanction.

[27] The chairperson held that after careful consideration of the aggravating and mitigating factors, demotion is an appropriate sanction.

Analysis: The grounds for review

[28] In the founding affidavit, the Applicant raised two grounds for review and a third ground was raised in the supplementary affidavit. In argument, Mr Mokgotho abandoned the third ground for review and the Applicant persisted only with the grounds for review as set out in the founding affidavit. Although the Applicant described two grounds for review in the founding affidavit, it is evident that there is in fact only one ground for review raised in respect of the two charges the Respondent was found guilty of.

[29] The review application is brought in terms of section 158(1)(h) of the Labour Relations Act[1] (LRA) and in terms of the principle of legality. The application is limited in the sense that it only seeks the review and setting aside of the sanction imposed by the chairperson.

[30] Section 158 (1)(h) of the LRA grants this Court the power to review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

[31] In *Hendricks v Overstrand Municipality and Another*[2], the Labour Appeal Court (LAC) considered the interpretation of section 158(1)(h) of the LRA and held that:

> 'In sum therefore, 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 requirements of the constitutional principle of legality, such being grounds "permissible in law".

[32] The LAC thus confirmed that a determination by a presiding officer in the public sector is reviewable on grounds listed in PAJA, common law and the principle of legality. *In casu,* the Applicant approached this Court on the principle of legality. There is no fixed list of requirements of the principle of legality, but is has been held to include *inter alia,* rationality.

[33] Rationality was defined by Hoexter[3] as follows:

> '[t]his means in essence that a decision must be supported by the evidence and information before the administrator as well as the reasons given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken.'

[34] The Applicant's ground for review is that the sanction of demotion imposed in respect of charge 1 and 2 is irrational, unreasonable and inappropriate.

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[1] Act 66 of 1995 as amended.
[2] [2014] 12 BLLR 1170 (LAC), (2015) 36 ILJ 163 (LAC) at para 29.
[3] Hoexter C *Administrative Law in South Africa,* 2nd edition, 340.

[35] This is so for a number of reasons. Firstly, in respect of charges 1 and 2 the chairperson found that the Respondent's conduct amounted to an abuse of authority, corruption and that he manipulated working procedures and subordinates by colluding with contractors for his own selfish ends. In essence, the Respondent was found guilty of abuse of authority, corruption and collusion.

[36] The Applicant's case is that acts of corruption and collusion do not only constitute serious misconduct, but are also criminal offences and in view of the seriousness of the misconduct the Respondent was found guilty of, demotion is not an appropriate sanction.

[37] Secondly, in his submissions for mitigation, the Respondent, notwithstanding the evidence and the guilty finding against him, maintained his innocence and continued to defend the charges. The Applicant's case is that this is indicative of the fact that he is unable to acknowledge his wrongdoing, to accept responsibility for his actions and to show remorse, which in turn shows that the Respondent's rehabilitation is unlikely.

[38] The Applicant's case is that demotion is not an appropriate sanction in circumstances where an employee has been found guilty of serious misconduct and rehabilitation is unlikely, as it is in the Respondent's case.

[39] Thirdly, in the Applicant's submissions in aggravation, it submitted that the employment relationship has broken down beyond repair and that a continued relationship with the Respondent was intolerable in view of the nature of the misconduct and the seriousness of the charges he was found guilty of. The Applicant made it clear that it was unable to trust the Respondent to carry out the duties attached to the position he held.

[40] The Applicant's case is that had the chairperson taken into consideration the seriousness of the misconduct the Respondent was found guilty of and the fact that the trust relationship had broken down, he could not have imposed a sanction of demotion.

[41] In short: considering the seriousness of the misconduct (corruption and collusion), the irretrievably broken down trust relationship and the unlikelihood of rehabilitation, the only appropriate sanction is dismissal.

[42] In my view there is merit in the Applicant's ground for review.

[43] *In casu,* it is evident that the chairperson, having found that the Respondent's conduct amounted to an abuse of power, collusion and corruption, failed to appreciate the seriousness of the misconduct when he imposed a sanction of demotion. He further failed to apply his mind properly or to give consideration to the fact that the Respondent never acknowledged any wrongdoing and that he was not a candidate for rehabilitation in circumstances where he persisted with his denial of wrongdoing, even after he was found guilty of misconduct. It is clear that the chairperson attached no weight to the submissions made in aggravation and he had no regard for the seriousness, nature, effect and employment implications of the Respondent's conduct. He spent no time or effort to consider the submissions and the reality of the breakdown of the employment relationship, notwithstanding the fact that this issue was pertinently raised by the Applicant.

[44] In *Overstrand*[4] the LAC has held that:

> '…The Constitution and the suite of local government legislation require municipalities to function effectively, efficiently and transparently. One of the principal objects of local government is to provide for democratic and accountable government to local communities. The first respondent has a public duty to eradicate corruption and malfeasance from within its ranks and structures...'

[45] The LAC further confirmed the conclusion of the Court *a quo* which held that[5]:

> 'Given the seriousness of the misconduct and the position of the employee as chief of law enforcement, the sanction imposed by the chairperson was irrational and unreasonable. He clearly did not apply his mind to the factors outlined above. The mitigating factors that he took into account do not remove the operational need of the municipality to ensure that senior officials in those

[4] *Supra* n 2 at para 20.
[5] Ibid at para 41.

> positions are exemplary in their conduct and can be trusted by the municipality and by the public. There is also a constitutional obligation on the municipality imposed by section 152 of the Constitution to provide accountable government for local communities; to ensure the provision of services to those communities; and to promote a safe and healthy environment. If the employee were to remain in the employ of the municipality, it would be failing in its duties to its ratepayers.'

[46] In the face of his findings on corruption and collusion, the chairperson indeed acted irrationally in imposing a sanction of demotion. The only rational and appropriate sanction, based on the evidence and the chairperson's findings, would be dismissal. This is more so where the trust relationship has broken down and where there is also a Constitutional obligation on the Municipality imposed by section 152 of the Constitution to provide accountable government for local communities; to ensure the provision of services to those communities; and to promote a safe and healthy environment. If the Respondent were to remain in the employ of the Municipality, it would be failing in its duties to its ratepayers. These material aspects were not considered by the chairperson.

[47] In the premises I make the following order:

Order

1. The sanction of demotion imposed by the First Respondent in the 'disciplinary hearing outcome' dated 21 February 2018 is reviewed and set aside;

2. The sanction imposed by the First Respondent is substituted with the following:

'The Second Respondent is dismissed with immediate effect.'

3. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advovate O Mokgotho
Instructed by:	De Swart Myambo Attorneys