IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of Interest to other Judges

Case No: J 1196/19

In the matter between:

DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA

(DENOSA) obo DAMARIA PHEMELO RAMAROANE **Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH,

GAUTENG PROVINCE **First Respondent**

S.G LOURENS NURSING COLLEGE **Second Respondent**

Heard: **5 June 2019**

Delivered: **19 June 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] DENOSA brought this urgent application on behalf of its member, Ms Phemelo Damaria Ramaroane, a student nurse/employee with the second respondent (Nursing College), to seek orders reviewing and setting aside the decisions of the College Council Disciplinary Committee in terms of which the training of Ramaroane was terminated, and to remit the issue of sentence to the College Council Disciplinary Committee for reconsideration before another

constituted committee. In the alternative, that this Court should replace the decision with such an order that it deems just and appropriate.

[2] The common cause facts leading to this application are essentially as follows;

2.1 Ramaroane was accepted as a student nurse by the Health and Social Development Department of the Gauteng Provincial Government in January 2016, to undertake a four year Diploma Course that would have led to her registration as a Nurse (General, Psychiatric, Community) and Midwife. She was required to attend classes and undertake studies/research and clinical practice at the College.

2.2 The nature of her association with the Department was such that she was as a student nurse, also granted temporary employment for the duration of her training course, and was accordingly remunerated.

2.3 As a student nurse/employee, she was subject to various codes and policies, including Policy Guidelines Regarding the Implementation and Management of Conditions of Employment of Nursing Students (The Policy); the Memorandum of Agreement (For Students on the Four Year Course Leading to the Registration as a Nurse) as entered into with the Department; the Labour Relations Sanctioning Guidelines for the Public Service; and the Disciplinary Code and Procedures for the Public Service (Resolution 1 of 2003: Disciplinary Code and procedure).

2.4 The College has a permanent orientation programme which is run at the beginning of each year where the new student nurses are orientated on the College's regulations, programmes and other applicable prescripts. That programme runs for two weeks for first year students, where the students are further provided with copies of the regulations, placements, and examination timetables.

2.5 Senior or old students are also required to attend these yearly programmes for the purposes of refreshing them on the regulations

and other prescripts governing their training. Their programme runs for one day.

2.6 All the students are further required to sign for receipt of all documents and to make an undertaking that they will, or have familiarised themselves with their contents, that they will continuously update themselves with these documents, and act accordingly during the period of their studies.

2.7 Ramaroane was a fourth year nursing student, and as is the norm, in January 2019, she acknowledged receipt of all the documents referred to above.

2.8 As part of the re-orientation, Ramaroane was scheduled to undertake a test in Community Nursing Science course on 25 January 2019. The cover page of the test script contained the test regulations and instructions to students. Significant with the cover page of these tests is a bold message stating that; *'Misconduct of any nature will be referred to the College Council Disciplinary Committee and may lead to termination of training*'.

2.9 In simple terms, and for the purposes of this application, students were specifically warned against cheating when undertaking tests and examinations. This message was equally clear in the Nursing College Regulations, which provided *inter alia* that; *"Students found copying during Council examinations should not be allowed to write another Council examination for a period of two years"*(Sic).

2.10 Ramaroane's case is that on the day of the test, she was anxious about her preparedness. Having arrived at the test venue and prior to the test scripts being distributed, she went out of the venue and made notes of certain medication terms that she expected to be included in the test on her right thigh. She then went back into the test venue and took the test. Whilst taking the test, she was overcome with guilt and had started to rub off the incriminating information from her thigh. It

was at that point that one of the lecturers saw her and approached her to establish what she was up to.

2.11 The nub of this extraordinary version of events is that Ramaroane was caught cheating in the examination by one of the lecturers, and was promptly told to leave the venue. Once outside the venue, she apologised for her conduct and expressed regret. Pictures of the offending material on her right thigh were taken by one of the lecturers, and she was then allowed to retake a different test.

2.12 Flowing from that incident, Ramoroane was then asked to write a report to explain her conduct. In her 'report', she simply repeated the above version and apologised for making a 'mistake'.

2.13 A disciplinary process followed on 1 March 2019. She had pleaded guilty to all the charges against her (except the charge of dishonesty), and was issued with a sanction of termination for two years as provided for in the Nursing College Regulations with effect from 31 March 2019.

2.14 Ramaroane lodged an appeal and complained about the process followed in terminating her training and employment. In particular, she complained about not being afforded an opportunity to plead in mitigation prior to the sanction being issued; that the sanction was harsh; that she had shown contrition, and had immediately apologised for her conduct after she was caught out.

2.15 The College Council Appeal Committee on 26 April 2019 rejected Ramaroane's appeal. She further accuses that Committee of having failed to address her various grounds of appeal.

Evaluation:

[3] This application is brought before the Court on an urgent basis in terms of the provisions of section 158(1)(h) of the Labour Relations Act (LRA)[1], as Ramaroane seeks to have the decision of the College Disciplinary and Appeal

[1] Act 66 of 1995 (as amended)

Committees to terminate her services be reviewed and set aside. She cites a number of grounds including that both Committees failed in not affording her an opportunity to present mitigating factors prior to considering an appropriate sanction; to have regard to the relevant prescripts including the Disciplinary Code and Procedure for the Public Service (Resolution 1 of 2003); and essentially failing to consider the factors that would have led to a less severe sanction.

[4] Obviously the first hurdle for Ramaroane to surmount is to convince this Court that her matter deserves the urgent attention of this Court, and in this regard, it is my view that she woefully failed for the following reasons;

4.1 This application was launched on 9 May 2019 in circumstances where her dismissal was confirmed by the Appeal Committee on 26 April 2019. She contends that there was no inordinate delay in bringing it, and this is clearly not correct.

4.2 The delay of two weeks within which it took DENOSA to launch this application is explained as being attributable to its own internal workings and the usual excuse of there being holidays in between. These are hardly acceptable excuses given the alleged urgency, and it is further not correct that the respondents have not been prejudiced by that delay. In the end, the urgency in this case in the light of the delays mentioned above is clearly self-created.

4.3 Aligned to the need to bring a matter as expeditiously as possible when the source of complaint arose is whether facts have been placed before this Court to satisfy it that indeed the matter deserves its urgent attention.

4.4 The starting point is that as soon as this Court allows matters involving an ordinary dismissal of employees to be heard on an urgent basis when on the common cause facts, the employee's conduct is the very cause of the quandary that he or she finds him/herself in, then the flood gates for any matter to be determined on an urgent basis in this Court will be opened. This will effectively erode the purpose of the urgent roll.

4.5 There is everything wrong when employees who knowingly and intentionally commit serious forms of misconduct, and then approach this Court for urgent relief when they find themselves dismissed. In such circumstances, it would be cynical, as Ramaroane had alleged, that as a result of the dismissal, she would suffer or continues to suffer harm because she is in her final year and will miss her final examinations. Clearly on the facts, any harm she will suffer is as a consequence of her own intentional dishonest conduct. It is self-inflicted harm.

4.6 As it was correctly submitted on behalf of the respondents, Ramaroane failed to set out cogent reasons why urgent relief was due to her. She was at all material times fully aware of the consequences of her dishonest conduct. She was caught cheating in an examination, was aware that she would be dismissed, and that her studies would be put to a halt for two years.

4.7 Being fully aware of these consequences, she had on the day of the examination, left the venue, went outside, wrote answers or whatever it was that was related to the examination on her right thigh with the sole purpose of cheating in the test, and went back into the examination room to take the test. Like a minor child caught with her hand in the cookie jar, she obviously could not justify her conduct other than to apologise when the monumental mess she had created for herself hit her. It is not even necessary to even think of the consequences of her conduct on the integrity of the examination process and to the nursing profession as a whole. In the end, she was the author of her own demise and I fail to appreciate which Court would under those circumstances, come to her aid on an urgent basis.

[5] It is further trite that Court would generally not come to a party's assistance on an urgent basis where it does not have jurisdiction or where there are adequate and/or alternative remedies available. It is correct as also pointed

out on behalf of the respondents, that jurisdiction is determined on the basis of the pleadings, and not on the substantive merits of the case.[2]

[6] Ramoroane's case as pleaded essentially boils down to procedural unfairness. As also correctly pointed out on behalf of the respondents, despite reliance on the provisions of section 158(1)(h) of the LRA, nowhere in her pleadings does she claim that the decision to terminate her services by both Committees constituted an administrative action, nor was it pleaded that such a decision was unlawful, arbitrary or irrational. The respondents further correctly pointed out obviously this Court lacks jurisdiction to determine the application, and I agree.

[7] Something needs to be said about matters come to this Court on an urgent basis under the provisions of section 158(1)(h) of the LRA under the guise of illegality, irrationality or unlawfulness, when in fact the cause of action points to unfairness. It was argued on behalf of the applicants that on the authority of *Hendricks v Overstrand Municipality & another*[3]*; Merafong City Local Municipality c SAMWU & another*[4] and *Solidarity & others v SABC*[5]*,* this Court may on an urgent basis, grant relief where there is a complaint in respect of any act performed by the State.

[8] The general proposition that this Court, based on the above authorities, should as a matter of law and fact, intervene under the provisions of section 158(1)(h) of the LRA in matters involving the State on the basis that it has jurisdiction, is clearly wrong and self-serving. The Court may have jurisdiction under those provisions, but it does not necessarily imply that it should assume jurisdiction let alone grant relief in all instances.

[9] It is apparent that the above authorities are often referred out of context and deliberately so. The Labour Appeal Court decision in *Hendricks* concerned itself with a review launched by the Municipality as an employer, against a

[2] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75
[3] [2014] 12 BLLR 1170 (LAC)
[4] [2016] 8 BLLR 758 (LAC)
[5] 2016 (6) SA 73 (LC)

decision of its own disciplinary process in respect of an employee. In this regard, and for the purposes of a distinction, it was explicitly stated that;

> 'The underlying guiding rationale of the *ratio decidendi* in *Gcaba* and *Chirwa* is that once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. The *ratio* cannot justifiably be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. Section 191(1)(a) of the LRA expressly restricts these remedies to "the dismissed employee or the employee alleging the unfair labour practice". The only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review; and section 158(1)(h) of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer. Moreover, as explained earlier, in the present case Clause 7.7 of the code, properly interpreted, does not amount to a contractual abandonment of all remedies. On the contrary, the proviso to the clause discloses an intention to retain a right to seek review by subjecting a final and binding determination to "any other remedies permitted by law". The intention is one of excluding an appeal by the employer while allowing for a review. As mentioned, the right of appeal against a presiding officer is available in terms of clause 15 of the code only to employees.'[6]

And,

> '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

[6] At para 27

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". The findings of the LAC and the SCA in that regard in *Ntshangase* are not inconsistent with the findings of the Constitutional Court in *Gcaba* or *Chirwa*, which are restricted to conclusions that unfair dismissals and unfair labour practices will normally not constitute administrative action on account of adequate alternative remedies existing under the LRA. Neither *Gcaba* nor *Chirwa* made any reference to *Ntshangase*, or, as I have said, section 158(1)(h) of the LRA. *Chirwa* was decided before *Ntshangase*, while *Gcaba* was handed down shortly after it. More recently, in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal,* the Constitutional Court cited *Ntshangase* with approval, indicating implicitly that it saw no inconsistency in the approach followed in that case with its own earlier pronouncements.

Concern was expressed by Steenkamp J in *National Commissioner of the SA Police and Another v Harri No and others* that the existence of a remedy allowing administrative review of disciplinary tribunals may result in something of an anomaly in that the imposition of a lesser sanction can be viewed as administrative action from the perspective of the employer while it will be a labour practice from the perspective of an aggrieved employee. That is true. But, as the Constitutional Court pointed out in *Gcaba,* it is not unusual for the same facts to give rise to different causes of action. An employer reviewing a sanction will normally be seeking a severer penalty, while the employee will be alleging an unfair labour practice and seeking no sanction or a lesser sanction. Should an employee seek an administrative law review of a lesser sanction he or she risks a finding, in accordance with the line of thinking in *Gcaba*, that the decision is not administrative action in terms of PAJA or that judicial policy as expressed in the Constitution dictates that the common law be developed to confine the remedy of review in section 158(1)(h) to legitimate challenges where there is no other available remedy. If a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be

processed by the system established by the LRA for their resolution'[7]. (Authorities omitted)

[10] To the extent that reliance was place on the judgment in *Solidarity v SABC,* again, that judgment is often referred to out of context, and without due regard to the nature of the dispute and the basis upon which relief in that matter was sought. In that case, the employees had pleaded their case as one of a breach of a specific term of their employment contract by the SABC, as the applicable disciplinary code was expressly incorporated into their contracts of employment. Their case was predicated on the provisions of section 77(3) of the Basic Conditions of Employment Act, in terms of which this Court has jurisdiction insofar as the issues in dispute related to contracts of employment.

[11] In this case, even if reliance is placed on Resolution 1 of 2003 to the extent that it was alleged that there were procedural flaws in dismissing Ramaroane, reliance in any event is not placed on the provisions of section 77 of the BCEA in seeking urgent relief. It is placed on a blanket assertion that this Court has jurisdiction under the provisions of section 158(1)(h) of the LRA, which in my view in the light of the authorities referred to above, is clearly misplaced.

[12] Reference to a review in terms of section 158(1)(h) of the LRA on the grounds of *'the common law in relation to domestic or contractual disciplinary proceedings'* in *Hendricks*[8]*,* does not imply that because the procedures under Resolution 1 of 2003 are applicable in this instance, that invariably implies that this Court has jurisdiction. The provisions of section 158(1)(h) of the LRA are only invoked in circumstances where a party lacks an alternative remedy, and in this case, the provisions of the Resolution makes reference to applicable dispute resolution procedures in an event of disputes surrounding its application and interpretation.

[13] In a nutshell, even if the dismissal of a public servant ordinarily involves the exercise of public power, the Court will be hard-pressed to find that any procedural irregularity that led to a dismissal, no matter how egregious the

[7] At para 29 - 30
[8] At para 29

irregularity, would by necessity involve the exercise of public power. To the extent that the guiding principle is that reviews under section 158(1)(h) of the LRA should only be entertained where there is no other remedy available under the provisions of that Act, the Court should guard against contrived arguments surrounding unlawfulness, illegality or irrationality of procedural decisions taken by the State as an employer, when the real cause of action clearly points to nothing but procedural unfairness, which is an issue adequately catered for under the provisions of section 191 of the LRA.

[14] The provisions of section 158(1)(h) of the LRA are not an open invitation to parties to review each and every act performed by the State as an employer. At most, La Grange J said so in *SABC* when he stated that the mere fact that the applicants were dismissed in breach of the contract of employment '*might not in and of itself warrant urgent relief*'[9]

[15] To further reflect on the decision in *Hendricks*, the central message is that there is a set of carefully-crafted rules and structures created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, and it is preferable to use that particular system. Thus, if a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for their resolution, and not by way of review under the provisions of section 158(1)(h) of the LRA.

[16] In this case, irrespective of the nature and label attached to Ramoroane's case, her cause of action is essentially based a dismissal for pure misconduct, and any allegations of procedural irregularities related to that dismissal are matters that are equally catered for under the provisions of section 191 of the LRA, and in any event, which on their own, do not give rise to the urgent intervention of this Court.

[17] To the extent that the applicants contended that the respondents were in breach of the provisions of provisions of Resolution 1 of 2003, an alternative

[9] At para 67

remedy is equally available by way of a referral of a dispute in terms of the provisions of section 24 of the LRA. Further to the extent that they challenged the substantive fairness of the dismissal, the provisions of section 191 of the LRA are available at the relevant Bargaining Council.

[18] As a further alternative, it was pointed out on behalf of the respondents that Ramaroane is at liberty to approach the South African Nursing Council, which provides a rehabilitation and support system during the two year period. This is something Ramaroane in my view needs to seriously consider, especially in the light of the nature of her misconduct, if she has any further designs of being an honourable nursing professional.

[19] In the end, the applicants have not laid a basis for this application to be treated as urgent, and ordinarily, this application ought to be struck off the roll. However, striking the matter off the roll will be of little comfort to the already over-burdened roll of this Court, and thus the application ought to be dismissed. This is so in that the applicants have not satisfied the requirements of final relief that they seek, which includes demonstrating a clear right, the absence of alternative remedies and irreparable harm. Her dismissal effectively amounts to a two year suspension from her training as a nurse, and she is at liberty to resume her studies thereafter. Thus any alleged harm (even self-inflicted) is not irreparable.

Costs and conclusions:

[20] In conclusion, it needs to be stated that the facts and circumstances leading to this urgent application are indeed extraordinary, and are symptomatic of the extreme abuse of this Court's processes, and in particular the urgent roll. No matter how much this Court has cautioned parties against bringing meritless applications on an urgent roll and awarding punitive costs orders, the rot never stops.[10] This Court has reached a point beyond exasperation because

[10] See *Sihlali & others v City of Tshwane Metropolitan Municipality & another* (2017) 38 ILJ 1692 (LC) at para 29, where it was held;

> 'I take this opportunity to warn practitioners approaching the urgent court with such matters to ensure that such exceptional circumstances as contemplated in the Booysen's case do exist. Otherwise they run a risk of punitive costs being made against their clients. It is good practice for practitioners practicing in this Court to keep themselves abreast with the

costs orders do not seem to deter parties from bringing matters on the urgent roll which should ought never in the first place, have passed a stage of the first draft of pleadings.

[21] Based on Ramaroane's own version of events, the attorneys of record ought to have taken stock and seriously reflected on whether there was any point in approaching the Court on an urgent basis. Clearly they failed to do so. One can only assume that upon final instructions and the final draft of the pleadings, the attorneys' approach was simply of *'let's see what the Court will say'.* This approach cannot be correct.

[22] DENOSA equally ought to have deeply reflected on the facts of this case after consultations with its member and asked itself the same questions. It is understandable that unions want to be seen to be acting in the interests of their members and fighting their cause. That is commendable. However, there is no cause to fight for in instances where an employee has acted in the most reprehensible and dishonest manner as evident from the common cause facts of this case. What cause can possibly be worth fighting for when an employee was dismissed for dishonesty involving cheating in an examination? What message is DENOSA sending to its members and other employees by vigorously challenging such a dismissal on an urgent basis? If the message to DENOSA members is unashamedly that *'we have your back'*, and it is perfectly normal to cheat and to be dishonest, and that they will be defended to the bitter end, then clearly there is something inherently wrong and palpably twisted with that logic. In these circumstances, to the extent that DENOSA failed to see the ill-fated and ill-conceived nature of this application, the requirements of law and fairness dictate that it be mulcted with punitive costs.

[23] Accordingly, the following order is made;

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judgments of this Court particularly those arising from the urgent court. There is a developing trend that points to the fact that the urgent court is being abused. Might I state, an urgent court is meant for urgent matters. This Court should not be detained to use its scarce, valuable time entertaining self-created urgent matters. Practitioners should exercise greater care when considering approaching this Court on urgency in matters where substantial redress is obtainable in due course.'

Order:

1. The Applicants' urgent application is dismissed.

2. DENOSA is ordered to pay the costs of the First and Second Respondents, on a scale as between attorney and own client.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: D Carls of Carls Attorneys

For the First & Second Respondents: S Mahlangu, instructed by the Office of the State Attorney