



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D314/2022

Not Reportable

In the matter between:

**DEPARTMENT OF HIGHER EDUCATION
AND TRAINING REPUBLIC OF SOUTH AFRICA**

Applicant

and

LUNTU NOCHA

First Respondent

NEHAWU

Second Respondent

T D NTSHANGASE NO

Third Respondent

Heard: 12 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 14 July 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] Pursuant to the third respondent in his capacity as the chairperson of a disciplinary enquiry having concluded that the first respondent had committed certain acts of misconduct he imposed a sanction of a three month unpaid suspension, together with a final written warning. When asked to endorse such an outcome the Minister for Higher Education, Science and Innovation was not prepared to do so, having noted,

'I suggest that the matter involving Mr L Nocha be referred to Adv Ndlovu as it is too serious a matter to just [indistinct] what is a lenient sentence. Sexual harassment and sexual favour must be [indistinct].'

[2] The issue of the third respondent's sanction was referred to the applicant's legal department which led to the initiation of the present application in which, *inter alia*, an order reviewing, correcting and setting it aside was sought. The applicant asked that the sanction be substituted with that of the first respondent's dismissal or, in the alternative, that the matter be remitted to the third respondent for him to determine the question of the sanction *de novo*. The application was opposed by the first respondent.

[3] As a result of the review application having been initiated more than a year after the sanction had been handed down, the applicant applied for condonation for the late delivery thereof. Certain delays occurred in the prosecution of the review application as a result of which the applicant also applied for its reinstatement. Neither applications were opposed by the first respondent and, this court having been of the opinion that the interests of justice warranted the granting of both orders, they were granted at the outset of the hearing of the matter.

Background

[4] On 25 October 2019 the first respondent was called to attend a disciplinary hearing by the applicant in relation to the following acts of alleged misconduct,

'a) On the 18th February 2019, at Cato Manor Campus you wilfully and intentionally disrupted the National Examination sitting, as a result of the students could not complete their examination. Your alleged conduct is a gross violation of sections 3.1; 3.2; 3.3; 7.2 and 7.9 of the Code of Professional Ethics for the South African Council of Educators.

b) On the 11th May 2019, at Thekwini TVET College you received a sum of R350.00 after demanding it from a student in return for an increased test marks and which resulted to her DP improving from 52% to 56%. Your conduct is a gross violation of sections 4.4.5 and 4.5.3 of the Code of Conduct for the Public Service and section 3.14 of the Code of Professional Ethics for the South African Council of Educators.

c) On the 19th May 2019, at Thekwini TVET College you received a sum of R200.00 after demanding it from a student in return for an increased test marks and which resulted to her DP improving from 52% to 56%. Your conduct is a gross violation of sections 4.4.5 and 4.5.3 of the Code of Conduct for the Public Service and section 3.14 of the Code of Professional Ethics for the South African Council of Educators.

d) On the 19th of May 2019, at Thekwini TVET College you demanded sexual favours from a student after she was unable to make a full payment of R600.00 in exchange for higher test marks. Your conduct is a gross violation of section 4.2.8, 4.4.5 and 4.5.3 of the Code of Conduct for the Public Service and section 3.9 and 3.12 of the Code of Professional Ethics for the South African Council of Educators.'

[5] Having concluded at the outset of his report that the first respondent was not guilty of the first act of misconduct alleged, the third respondent concluded otherwise in respect of the final three allegations. The basis upon which he reached such conclusions are unclear as the third respondent's analysis of the evidence which preceded his verdict provides no clear explanation for his findings. His final verdict read,

'I have no doubt that the employer was unable to cover the most crucial aspect in completing the clandestine or puzzle that would quantify and justify

its prayer for dismissal, however the balance of probability strongly suggest that there was indeed an element of misconduct by Mr Nocha. Thereby finding Mr Nocha Guilty as charged and he should be suspended for the period of three (03) consecutive months without emoluments Plus final written warning.'

[6] The first respondent unsuccessfully appealed the outcome of the enquiry. The Minister for Higher Education, Science and Innovation's subsequent consideration of the matter and refusal to endorse the third respondent's sanction resulted in the present review application.

Analysis

[7] It was the applicant's case that the third respondent's decision to impose a sanction other than dismissal was unreasonable in the light of the evidence before him, and that in consideration of the gravity of the offences which the first respondent was found to have committed, no sanction other than that of dismissal could be countenanced.

[8] Before considering whether the sanction imposed by the third respondent falls to be reviewed and set aside, it is first necessary to deal with the applicant's concerns regarding the third respondent's treatment of certain hearsay evidence relied upon by it in the course of the disciplinary hearing. In the present application, the applicant asserted that the third respondent had excluded such evidence and thereby committed a reviewable irregularity. The first respondent asserted that reliance on such evidence in the absence of the student to whom the allegations related having testified militated against a finding that he had been guilty of the offenses at all.

[9] Despite the third respondent's analysis of the principles applicable to the admission of hearsay evidence, it is uncertain as to what his ultimate decision in this regard was. Whatever his conclusion may have been however, he ultimately found that the first respondent had committed the offences complained of. Such finding was not the subject matter of the present application. The applicant's challenge was

confined to the sanction imposed, whereas the first respondent did not seek to disturb any of the third respondent's conclusions regarding the infractions themselves. The third respondent's treatment of the hearsay evidence in question was seemingly immaterial to his determination regarding the sanction and accordingly need be considered no further.

[10] The factors which informed the third respondent's conclusion that the appropriate sanction was that of suspension without pay coupled with a final written warning were also not clear from his report. Having summarised the evidence of the parties' witnesses, the third respondent commenced his analysis of the evidence by examining the tensions between their respective versions, together with the circumstantial and documentary evidence relevant to the charges. He thereafter mentioned the failure on the part of the applicant to have called the student to testify, and subsequently examined the law relevant to hearsay evidence. Without making any explicit findings concerning either the admissibility of the hearsay evidence or which version he preferred, he proceeded to consider what he believed to have been the applicable law relating to dismissals. This included both an analysis of Item 7 of Schedule 8 of the LRA as well as the principles relevant to the assessment of the fairness of a dismissal established in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC).

[11] The applicant asserted in the present application that the third respondent erred in the manner in which he had applied Item 7 of Schedule 8 to the LRA when determining the sanction, but did not take issue with the applicability such provision. The first respondent, likewise, did not dispute the applicability of that provision, but denied that it had been erroneously applied.

[12] Item 7 of Schedule 8 to the LRA is the guideline applicable to the determination of the fairness or otherwise of a decision already taken to impose of the sanction of dismissal. Given that the third respondent was himself required to determine the appropriate sanction, and was not required to assess the fairness of a decision to dismiss an employee which has already been taken, Item 7 of Schedule 8 was irrelevant to his enquiry. Having been required to determine the appropriate sanction upon having found the first respondent to have been guilty of three acts of

misconduct he was bound to adhere to the guideline established under Item 3 of Schedule 8.

[13] As regards the reasonableness of the sanction, the applicant asserted that the third respondent:

- failed to take into account the competing interests of the applicant, the students and the first respondent;
- did not give due weight to the importance of the rule and the harm occasioned by its breach;
- erred in attaching undue weight to the evidence that the first respondent had been recalled to his position after his precautionary suspension;
- attached undue weight to the first respondent's unblemished disciplinary record which did not sufficiently negate the sanction of dismissal;
- failed to appreciate that the first respondent's long service was not a bar to a sanction of dismissal;
- committed an irregularity when he found that the first respondent had not been '*charged for dishonesty and that leading evidence on the working relationships would still be proper and justify the irreparable relationships*'; and that
- the reasons advanced by the third respondent in relation to the sanction did not support the conclusion arrived at;

[14] The rationale for the third respondent's sanction cannot be discerned from his report. Despite having been afforded an opportunity to furnish the reasons for his decision in the present application¹, he did not avail himself thereof. Absent the third respondent having expressly explained his reasoning in having arrived at his conclusion that the sanction of a suspension coupled with a written warning sufficed, it is not possible to assess the rationality of his decision.²

[15] In the course of the third respondent's analysis he:

¹ R7A(2)(b)

² See Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at paragraph 47

- acknowledged that the allegations against the first respondent were to be viewed in a serious light;
- mentioned that although the first respondent had been placed on a precautionary suspension, his suspension had been uplifted prior to the disciplinary proceedings having commenced; and
- seemed to suggest that by virtue of the fact that the first respondent had not been charged with an act of dishonesty, it would be possible to restore the relationship.

All that may be gleaned from his having mentioned these issues in passing is that they may possibly have influenced his ultimate decision regarding the sanction.

[16] If these were, indeed, the factors which led to his sanction, then the only conclusions which can be drawn are that (1) he misconstrued the nature of the misconduct which the first respondent had been found to have committed, and (2) failed to take all the factors relevant to the determination of the appropriate sanction into account.

[17] As regards the first aspect, the second and third of the charges entailed the breach of clause 3.14 of the Code of Professional Ethics for the South African Council of Educators, which requires an educator to refrain from abusing *'the position he or she holds for financial, political or personal gain'*. The particularity of the offences which the first respondent was found to have committed in contravention of clause 3.14 entailed the receipt of payment of the amounts of R350.00 and R200.00 by a student in exchange for his having inflated a score in one of her tests from 27% to 47%, which resulted in her DP score increasing from 52% to 56%. Such conduct is nothing other than an act of dishonesty. As regards the second issue, if the remaining factors mentioned by him were indeed the only factors he took into account in arriving at the sanction (the seriousness of the infractions and the first respondent's suspension having been uplifted), then the third respondent failed to take all relevant factors into account in having arrived at his decision, including those asserted by the applicant in the present application.

[18] For these reasons, the third respondent's sanction falls to be reviewed and set aside.

[19] It is the applicant's case that this court should substitute the sanction with that of dismissal. In this regard, the applicant took issue with the third respondent's statement that it had introduced no evidence to suggest that the working relationship between the parties had been irretrievably damaged. The applicant argued that the evidence introduced in relation to the charges themselves demonstrated that the first respondent had breached his duty towards the applicant and the conclusion that the trust relationship had been irreparably damaged implicitly arose from the gravity of the misconduct alone.

[20] The principle that a break down in the relationship between the parties can invariably be inferred in circumstances in which the misconduct in question evinces a measure of dishonesty was confirmed by the Labour Appeal Court in Autozone v Dispute Resolution Centre of Motor Industry and Others (2019) 40 ILJ 1501 (LAC),

*'An employer relying on irreparable damage to the employment relationship to justify a dismissal would be prudent normally to lead evidence in that regard, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and/or the circumstances of the dismissal. Where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible.'*³

[21] The Labour Appeal Court reiterated this principle in Algoa Bus Company (Pty) Ltd v TASWU obo Mzawi and Others (2025) 46 ILJ 89 (LAC),

'In sum: contrary to what the Labour Court held, there is no obligation in law on an employer to adduce evidence on the appropriateness or suitability of dismissal as a sanction for misconduct, as a necessary condition for any

³ At paragraph 12

*finding of unfair dismissal. An arbitrator making a decision on the appropriateness of dismissal as a sanction for misconduct must make a value judgement, taking into account all relevant facts and circumstances. A breakdown in trust or deterioration in the employment relationship may be inferred from the evidence regarding these facts and circumstances.*⁴

[22] Although both these decisions concern the *ex post facto* assessment of the fairness of a dismissal, there is no reason that the principles stated therein ought not to apply equally to the determination of the appropriate sanction to be imposed upon an employee having been found to have committed misconduct. In making such a determination, the ultimate question to be answered in the light of the totality of the evidence before the decision maker is whether the relationship between the parties has irretrievably broken down.

[23] Item 3 of Schedule 8 provides the guideline to be applied in the determination of the appropriate sanction,

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of s188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the

⁴ At paragraph 17

past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[24] Despite that the existence of dishonesty is likely to destroy the employment relationship, and there will be circumstances in which the nature of misconduct may in the absence of any counter-veiling evidence suffice to arrive at the conclusion that the employment relationship has been destroyed thereby, it cannot be said that dismissal is, without exception, the inevitable and only possible sanction which can be imposed where dishonesty is present or the misconduct is serious. Each case is required to be determined on its own merits.

[25] When considering the appropriateness of a court substituting its own sanction for that of the original decision maker rather than remitting the matter to the decision maker for his or her reconsideration the Supreme Court of Appeal in Ntshangase v MEC: Finance Kwa-Zulu Natal and Another (2009) 30 ILJ 2653 (SCA) stated,

*'It is indeed correct that it is well established that, ordinarily, a court will refer a matter back to the administrative functionary for reconsideration rather than to substitute its own decision for that of the functionary. The underlying reasons for this are as Heher JA stated in Gauteng Gambling Board v Silverstar Development Ltd and Others 2005 (4) SA 67 (SCA) in para 29 that such a functionary is generally best equipped by amongst others, its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. However this principle is not inflexible. The facts of each case will determine whether it is fair and practical to remit the matter to the original functionary or of the court to substitute its own decision for that of the original functionary.'*⁵

[26] In consideration of the possible substitution of sanction in the present instance, this court finds that there are certainly factors indicating that the first respondent's conduct has potentially rendered the continued employment relationship untenable: the misconduct was both serious and evinced dishonesty on his part. Moreover, in advancing his defence (impliedly rejected by the third

⁵ At paragraphs 21 - 22

respondent) he not only evinced a complete lack of contrition, but argued that the applicant itself had purposefully set about fabricating documentation and evidence in order to orchestrate his dismissal.

[27] From the third respondent's report, however, there was at least one factor referred to and seemingly relied upon by him which militated against the imposition of the sanction of dismissal, and that was the fact that the first respondent's suspension had been uplifted prior to the commencement of the disciplinary enquiry,

'... it is trite that initially the employee was precautionary suspended and recalled prior to the beginning of the disciplinary processes thus allowing the possibilities of mending the relationships between the parties.'

[28] In the present proceedings the applicant did not furnish this court with the entire record. The effect thereof was that this court was unable to establish from the record the basis upon which the first respondent's suspension had been uplifted, whether possibly as a result of the effluxion of a mandatory time period, or because the applicant did not perceive the misconduct as having been an impediment to the first respondent's continued performance of his work functions. As this factor is of relevance to the determination as to whether the employment relationship has been destroyed as a result of the first respondent's misconduct, and this court is unable to make any finding in relation thereto, it is not in a position to make a determination as to whether the employment relationship has been irreparably compromised, and hence the appropriate sanction to be applied. The issue of the appropriate sanction will accordingly be required to be remitted to the third respondent for his reconsideration.

Costs

[29] The applicant asked that the first respondent be ordered to pay its costs.

[30] Given that the first respondent opposed the application to defend a decision taken which preserved his status as an employee of the applicant, this court is not of

the view that such opposition was not unreasonably undertaken, and he will accordingly not be required to pay the applicant's costs.

Order

1. The applicant's review application is reinstated.
2. The applicant is granted condonation for the late delivery of its review application.
3. The sanction handed down by the third respondent on 2 February 2021, that the first respondent be suspended for a period of three consecutive months without emoluments and be given a final written warning, is reviewed and set aside.
4. The issue of the appropriate sanction to be imposed as a consequence of the first respondent having been found to have committed the acts of misconduct alleged under items (b), (c) and (d) of the applicant's notice to attend a disciplinary hearing dated 25 October 2019 is remitted to the third respondent for his reconsideration.
5. There is no order as to costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Ms N Bhagwandeem, instructed by the State Attorney, KwaZulu-Natal

Respondent:

Mr A Moodely, Adrian Moodley Attorneys