THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 402/08

HAMILTON NTSHANGASE Appellant

and

MEC FOR FINANCE: KWAZULU-NATAL 1ST Respondent
MEC FOR EDUCATION: KWAZULU-NATAL 2ND Respondent

Neutral citation: *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another* 402/08 [2009] ZASCA 123 (28 September 2009)

Coram: BRAND, NUGENT, HEHER, SNYDERS JJA et BOSIELO AJA

Heard: 7 SEPTEMBER 2009
Delivered: 28 SEPTEMBER 2009

Summary: Labour law – whether an employer in the public sector is entitled to review its own decision pursuant to a disciplinary enquiry, not to dismiss an employee – whether on the merits the decision in question was reviewable and whether the Labour Appeal Court should have substituted its own decision to dismiss the appellant instead of referring the matter for a rehearing on the issue of an appropriate sanction.

ORDER

On appeal from: Labour Appeal Court (Zondo JP, Pillay et Kruger AJJA on appeal from the Labour Court)

1. The appeal is dismissed.

JUDGMENT

BOSIELO AJA (Brand, Nugent, Heher et Snyders JJA concurring)

[1] The appellant was employed in the Department of Education: Kwazulu-Natal, as Director: Arts, Culture, Museum Services and Youth Affairs. He was charged and found guilty of twelve charges of misconduct in a disciplinary hearing initiated by the second respondent, the MEC for Education: KwaZulu-Natal, and chaired by Mr Wentworth Dorkin (Dorkin). With regard to the sanction that should be imposed, Dorkin determined that the appellant should be given a final written warning. The second respondent found that sanction inappropriate. In his view the appellant should have been dismissed. He therefore brought a review application in the Labour Court for the proposed sanction to be set aside and replaced with the sanction of dismissal. His application to the Labour Court was unsuccessful. However, on appeal to the Labour Appeal Court, the decision of the Labour Court was set aside and the second respondent's review application was granted. The Labour Appeal Court set aside the sanction imposed on the appellant by Dorkin, the chairperson of the disciplinary hearing, and replaced it with a sanction of dismissal with immediate effect. The appellant is appealing against the judgment of the Labour Appeal Court with special leave of this court.

[2] The facts of this matter are fairly simple and to a large extent common cause. A succinct account will suffice to elucidate this judgment. As I have said, the appellant was charged and convicted of twelve counts of misconduct, involving allegations of wilful or negligent mismanagement of the

State's finances and of abusing his authority. Facts found by Dorkin to support these charges indicated, inter alia, the unauthorised awarding of bursaries to various students amounting to approximately R1m and the unauthorised purchase by the appellant of goods exceeding R500 000. It also transpired that the second respondent suffered a loss of R200 000 from the last mentioned transaction. After considering some evidence tendered both in aggravation and mitigation of sentence, Dorkin decided, as I have said, that the imposition of a final written warning would be an appropriate sentence. That is the decision which gave rise to the review proceedings by the second respondent; first unsuccessful in the Labour Court and then successful in the Labour Appeal Court.

[3] In his answering affidavit the appellant admitted that he was found guilty on all twelve counts and stated further that he did not challenge any of Dorkin's factual findings. As clearly foreshadowed in the appellant's notice of appeal the appellant raised three legal issues for determination by this court, namely:

'15.1 Whether Dorkin's decision not to dismiss the appellant constitutes administrative action which in principle is reviewable at the instance of the respondent;

15.2 if it is, whether the respondent made out a proper case to review and set aside Dorkin's decision on the merits; and

15.3 In the event that both of the aforementioned questions are decided in the respondent's favour, whether LAC was correct in deciding itself to dismiss the appellant in preference to the alternative relief sought in the review application, namely the referral of the matter for decision by another presiding officer in respect of the appropriate sanction.'

In supplementary heads of argument volunteered by the appellant, the appellant added another ground of appeal to the three referred to above, namely what the applicable grounds of review are in this matter.

[4] Although the second respondent initially relied on s158(1)(g), (h) and (j) of the Labour Relations Act 66 of 1995 (LRA) as grounds for its review, the arguments both in the Labour Court and the Labour Appeal Court were confined to s158(1)(h) of the LRA.

[5] It became clear during argument before us that the appellant relied on

the decision of *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367(CC) and a recent decision by this court in *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA) for its main proposition that a decision by an organ of state to dismiss one of its employees or not to dismiss such an employee does not constitute administrative action and is therefore not reviewable by the Labour Court. However, it was conceded on behalf of the appellant that the Labour Court has jurisdiction to adjudicate second respondent's claim under s 158(1)(h) of the LRA. The appellant contended however that s 158(1)(h) of the LRA does not establish a statutory right of review where none existed either in terms of the common law or Promotion of Administrative Justice Act 3 of 2000 (PAJA). It was submitted therefore that Dorkin's decision not to dismiss the appellant is not administrative action and is therefore not reviewable.

[6] Regarding the decision by the Labour Appeal Court to substitute its own decision for that of the chairperson of the disciplinary enquiry, it was submitted that a decision to dismiss is essentially an operational decision. It was contended that as the element of trust is at the heart of every employment relationship, the Labour Appeal Court was not in a position to decide on an appropriate sanction as it had no knowledge of the appellant's employment history in the period between his reinstatement and when the appeal was heard. In other words, the Labour Appeal Court was not in a position to consider all facts relevant to a determination of an appropriate sanction. The upshot of the argument is that having reviewed and set Dorkin's decision aside, the Labour Appeal Court should have referred the matter back to the disciplinary hearing for a determination of an appropriate sanction. The appellant argued that there are no exceptional circumstances to justify the decision by the Labour Appeal Court not to refer the matter back to the disciplinary hearing for a reconsideration of an appropriate sanction and to impose it itself.

[7] On the other hand the second respondent, relying on *Sidumo & Another v Rustenburg Platinum Mines Limited & Others* 2008 (2) SA 24(CC), submitted that a disciplinary enquiry of the type undertaken in terms of the

Public Service Co-ordinating Bargaining Council (PSCBC) Resolution 2 of 1999 constitutes administrative action which is reviewable not in terms of s 33 of the Constitution of the Republic of South Africa (the Constitution) or PAJA but under s 158(1)(h) of the LRA. It was submitted that because Resolution 2 created a statutorily imposed disciplinary system which involved an independent enquiry, the procedure was in substance the same as that which would be followed in arbitration proceedings before the CCMA. In terms of *Sidumo* arbitration proceedings are reviewable in terms of the LRA. It was contended that by parity of reasoning Dorkin's decision at the disciplinary hearing held in terms of Resolution 2 is reviewable. Furthermore, it was contended that in terms of Resolution 2 the second respondent does not take an independent decision after the hearing is finalised but is obliged to implement the sanction pronounced by the chairperson of the disciplinary enquiry. As a result Dorkin's decision becomes that of the second respondent. Based on this, it was submitted that the enquiry undertaken by Dorkin cannot be correctly described as 'an internal managerial enquiry.'

[8] The second respondent contended that in terms of Resolution 2 Dorkin was obliged to follow due process and then pronounce an appropriate sanction. In so acting, he would be acting *qua* the second respondent which is the State itself. As Dorkin had failed to apply his mind to the issue of an appropriate sanction thus resulting in him arriving at an irrational decision, it was argued that the second respondent was not only entitled but obliged, in the public interest, to have Dorkin's irrational decision reviewed by a court of law. This is particularly so as the employer, as opposed to the employee, does not have a right of appeal. It was argued that the contrary argument is untenable as it implies that in the absence of the right to appeal or review its own decision, the second respondent would be left in an invidious position where it would be forced to enforce a decision with which it does not agree or one which is patently unjustified. Relying on *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) the second respondent contended that it was not only entitled but was obliged to take Dorkin's decision on review.

[9] Concerning the question whether the Labour Appeal Court should have referred the matter back to the disciplinary hearing for a reconsideration of an appropriate sanction, the second respondent submitted that on the facts of this case, the only appropriate sanction which Dorkin could have imposed is a dismissal. It was contended that, given the gravity of the appellant's misconduct, any other sanction would have been irrational. The essence of this submission is that it would be futile and fruitless to refer the matter to Dorkin when the sanction he should have imposed is a foregone conclusion. The second respondent maintained that the Labour Appeal Court acted correctly in the circumstances as all it did was to replace Dorkin's sanction with the sanction which he should have imposed.

[10] The crisp legal issue in this appeal is therefore whether Dorkin's decision amounts to administrative action or not. This question has created a lot of controversy in the past. To my mind the first port of call is s 33(1) of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution) which provides that :

'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

In an attempt to define what administrative action is, the Constitutional Court stated the following in *President of the Republic of RSA v South African Rugby Football Union* 2000 (1) SA 1(CC) in para 141:

'In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure,* that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

[11] In grappling with the difficult task of trying to define a difficult and complex concept like 'administrative action' Professor Cora Hoexter states in her book, *Administrative Law* In South Africa at p 167:

'In the SARFU case the Constitutional Court admitted that deciding what is and what is not administrative action "may be difficult" and suggested that it would have to be done on a case-by-case basis. It offered the following as relevant considerations in the diagnosis: the source of the power, the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related to policy matters – which are not administrative – or to the implementation of legislation which is characteristic of administrative action.'

[12] To my mind, it cannot be argued that the second respondent is not an organ of State as envisaged by s 239 of the Constitution. Furthermore, there is no gainsaying that the second respondent exercises public power in the public interest in terms of legislation. This gives the second respondent's powers the necessary public character as opposed to a private character. Undoubtedly, when the second respondent appointed Dorkin to preside over the appellant's disciplinary hearing, it did so in its capacity as the State. It follows, in my view, that Dorkin's action complained of herein which essentially is that of the second respondent qualifies as administrative action. That being so, such action has to be lawful, reasonable and procedurally fair as contemplated by s 33(1) of the Constitution.

[13] It is not in dispute that Dorkin was appointed by the second respondent as chairperson of the disciplinary hearing involving the appellant to preside over it as its (second respondent's) representative. Dorkin was appointed in terms of Resolution 2. In terms of Resolution 2 the second respondent is obliged to execute the decision taken by Dorkin, the chairperson of the disciplinary hearing. To my mind, it follows that Dorkin was acting *qua* the second respondent and his decision became that of second respondent. It is common cause that Resolution 2 embodies the procedure negotiated and agreed upon by the employer and trade unions representing the employees. Unlike an ordinary collective agreement, the procedure embodied in Resolution 2 has a statutory force which is buttressed by s 23 of the LRA which provides clearly that the collective agreement binds the parties thereto. As this court observed in *S v Prefabricated Housing Corporation (Pty) Ltd & Another* 1974 (1) SA 535 (A) at p 539G-540B:

'It is true that the type of document now under consideration is termed under the Act and in

industrial parlance an "agreement", and it is said to be "negotiated" or "entered into" but technically it is not a contract in the legal sense . . . . From all those provisions it is clear, I think, that an industrial agreement is not a contract but a piece of subordinate, domestic legislation made in terms of the Act by the industrial council and the Minister. (See the clear and concise summary of the position given by Dowling J, in *South African Association of Municipal Employees (Pretoria Branch) and Another v Pretoria City Council* 1948 (1) SA 11 (T) at p 17). In that respect it does not differ from by-laws made by the council of a local authority and approved by the Administrator of a Province under its Local Government Ordinance, or from a wage determination made by the Minister on the recommendation of the Wage Board under the provisions of the Wage Act, presently 5 of 1957, both of which are similarly regarded. (See *Rex v Stoller,* 1939 A.D. 599 at pp 616-8; Kneen's case supra at pp 406-7). . . '.

[14] It is plain from paras 10 to 12 above that the powers to be exercised by Dorkin in terms of Resolution 2 in the disciplinary hearing against the appellant qualify as public power or a public function performed in terms of Resolution 2 which has statutory authority in terms of s 23 of the LRA. Furthermore, it cannot be gainsaid that the exercise of such public power by Dorkin was in the public interest and had a direct and external effect on at least the appellant's employment relationship with the second respondent. To my mind, it follows that the decision by Dorkin qualifies as administrative action. However, the vexed legal question remains whether Dorkin's decision is reviewable at the instance of the second respondent or not. If so, is it under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or s 158(1)(h) of the LRA?

[15] S 158(1)(h) of the LRA provides as follows:

' 158(1) The Labour Court may-

. . .

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;'

. . . .'

Undoubtedly this section provides in explicit terms that a decision like the one taken by Dorkin who acted *qua* his employer can be reviewed on such grounds as are permissible in law. The ground relied upon by the second respondent for the review of Dorkin's decision is rationality, which is one of the

recognised grounds of review. I am therefore of the view that Dorkin's decision can be taken on review under s 158(1)(h) of the LRA.

[16] I am also persuaded to agree with Zondo JP in his judgment in the Labour Appeal Court where he stated in para 10:

'In *Sidumo & Another v Rustenburg Platinum,* case no: CCT 85/06 as yet unreported, which was handed down on the 5th October 2007, the Constitutional Court had to decide whether, when a CCMA commissioner conducts arbitration proceedings under the compulsory arbitration provisions of the Labour Relations Act 1995 (Act 66 of 1995) ("The Act") to resolve a dismissal dispute, that constitutes administrative action. It held that such action does constitute administrative action. It seems to me that if the conduct of compulsory arbitrations relating to dismissal disputes under the Act constitutes administrative action, then the conduct of disciplinary hearings in the workplace where the employer is the State constitutes, without any doubt, administrative action. If it constitutes administrative action, then it is required to be lawful, reasonable and procedurally fair. Accordingly, if it can be shown not to be reasonable, it can be reviewed and set aside.'

[17] However, this is not the end of the conundrum. Having found that the decision by Dorkin amounts to administrative action, the pertinent legal question remains whether the second respondent (the employer) had the *locus standi* to take the matter on review. In this court, like in the court below, the appellant seriously challenged the second respondent's *locus standi* to bring the review proceedings. To my mind the answer to this legal question hinges on whether Dorkin acted as the second respondent or as an independent arbiter. It is common cause that Dorkin was appointed in terms of Resolution 2 which provides that the employer is bound by Dorkin's decision. In the result Dorkin's decision becomes that of the second respondent as Dorkin acted *qua* the second respondent. Admittedly the challenge raised herein is novel as it has never enjoyed the attention of our courts. However, I found some guidance from *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA), where confronted by a similar problem, this court held as follows in para 10:

'This Court has already held that if an administrative act has been performed irregularly – be it as a result of an administrative error, fraud or other circumstance – then, depending upon the legislation involved and the nature and functions of the public body, it may not only be entitled but also bound to raise the matter in a court of law, if prejudiced: *Transair (Pty) Ltd v National*

Transport Commission and Another 1977 (3) SA 784 (A) at 792H-793G.'

[18] Although *Pepcor* involved the action by the Registrar of Pension Funds this *dictum* is equally applicable to this case as both the Registrar and the second respondent are public functionaries exercising a power in the interests of the public in terms of legislation. Based on the *Pepcor* judgment I am of the view that the second respondent was not only entitled, but bound to take Dorkin's decision on review. This it could competently do in terms of s 158(1)(h) of the LRA which makes clear provision for such a review on such grounds as are permissible in law. As Cloete JA aptly remarked in *Pepcor* in para 13:

'. . . . It is unthinkable that, if the Registrar were to realise *ex post facto* that there had not been compliance with the section, he could not apply to Court to have it set aside. Compare in this regard what was said by this Court in *Rajah and Rajah Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407 E:

Mr *De Villiers* for the Council submitted that in the exercise of its statutory functions it has an administrative interest, on behalf of the public, in certificates for local trading. I agree: that is what gives it a *locus,* unlike a purely judicial tribunal.

It would indeed be the Registrar's duty to make such an application, if prejudiced.'

Undoubtedly the second respondent has an interest in ensuring that fair labour practices are upheld in its employment relationships. The same holds true for its employees. All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable Public Administration in accordance with ss 195 and 197 of the Constitution. I therefore find that the second respondent had the necessary *locus standi* to take Dorkin's action on review to the Labour Court.

[19] The second respondent contended that Dorkin acted irrationally in deciding to give the appellant a final written warning instead of dismissing him, given the seriousness and gravity of the charges for which he was found guilty. Furthermore, the second respondent argued that based on Resolution

2 the second respondent has no choice but to execute the decision by Dorkin, wrong and irregular as it may be. Undoubtedly, Dorkin's decision has caused the second respondent some prejudice in that, despite the alleged breakdown of trust, the second respondent is obliged to retain the appellant in employment. Furthermore, second respondent contended that if Dorkin's decision was allowed to stand, it would be difficult for the second respondent to impose the sanction of dismissal on anyone of its employees in line with the hallowed principle of parity of treatment of employees. The Labour Appeal Court found in para 18 of its judgment that 'a finding by Dorkin that this was a case in which dismissal was not an appropriate sanction and that a final warning was, is a conclusion which could only be reached by someone who did not exercise any discretion at all and who simply acted arbitrarily and did not apply his mind at all. To the extent that his decision constitutes an administrative action, I have no hesitation in concluding that his decision is a decision that no reasonable person could reach on the facts of this case and his decision is not just unreasonable but is, without doubt, grossly unreasonable . . . .' Suffice to state that I am in respectful agreement with this *dictum.*

[20] I agree that Dorkin's decision, measured against the charges on which he convicted the appellant appear to be grossly unreasonable. Given the yawning chasm in the sanction imposed by Dorkin and that which a Court would have imposed, the conclusion is inescapable that Dorkin did not apply his mind properly or at all to the issue of an appropriate sanction. Manifestly, Dorkin's decision is patently unfair to the second respondent. To my mind, it fails to pass the test of rationality or reasonableness (see *Pharmaceutical Manufacturers of SA and Another:* in re *Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674(CC) para 89; *Sidumo And Another v Rustenburg Platinum Mines Ltd And Others* 2008 (2) SA 24(CC) paras 106 and 276; *Toyota SA Motors (Pty) Ltd v Radebe and Others* [2000] 21 ILJ 340 (LAC) para 53). In the circumstances, the second respondent was entitled to take such a decision on review in terms of s 158(1)(h) of the LRA to have it set aside.

[21] Having reviewed and set aside Dorkin's decision on the basis of gross unreasonableness, the Labour Appeal Court imposed a sanction of dismissal on the appellant. A strong attack was levelled against the decision of the Labour Appeal Court on the basis that there were no exceptional circumstances which justified the Labour Appeal Court departing from the established and orthodox approach and to take such a decision. The main argument was that the Labour Appeal Court did not have all the relevant material to consider in the determination of an appropriate sanction. 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.

[22] The facts of each case will determine whether it is fair and practical to remit the matter to the original functionary or for the court to substitute its own decision for that of the original functionary. The appellant was suspended on 25 August 2000 pending the outcome of a disciplinary hearing. On 12 February 2002 the appellant was given a final written warning. During July 2002 he was reinstated. The review application was finalised in the Labour Court on 18 March 2005 when the application was dismissed. The judgment of the Labour Appeal Court was delivered on 21 December 2007. Manifestly there has been a time lapse of approximately five years from the time of the original sanction to the judgment of the Labour Appeal Court. To remit this matter to the chairperson of the disciplinary hearing in a situation where the appropriate sanction to be imposed is inevitable, would, to my mind, not be fair to both parties.

[23] Given the nature and gravity of the misconduct for which appellant was found guilty, there can be no argument that dismissal was the only appropriate sanction. Referring the matter to the disciplinary hearing to

impose a sanction of dismissal would, in my view, serve no purpose.

[24] What remains to be determined is the issue of costs. Both the Labour Court and Labour Appeal Court did not make any order regarding costs. In the result, I think it is appropriate not to make any order regarding costs.

[25] In the result the following order is made:

1. The appeal is dismissed.

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L O BOSIELO
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	C E WATT-PRINGLE SC Ms D LANDSTRöM (Pupil) Instructed by MACGREGOR ERASMUS ATTORNEYS, DURBAN LOVIUS BLOCK, BLOEMFONTEIN
FOR RESPONDENT:	P J OLSEN SC M G de KLERK Instructed by FEISAL ABRAHAM ATTORNEYS, DURBAN MATSEPES INC, BLOEMFONTEIN