

-----LABOUR NEWS-----

23 November 2009

**Compiled by: Adv J Delpont
Delpont Labour Consultants**



Ekhuruleni Metropolitan Municipality v Mashazi and Another [2009] ZALC 90

JUDGEMENT: FRANCIS J

Introduction:

The applicant, the Ekhuruleni Metropolitan Municipality, brought an application to review and set aside the disciplinary proceedings instituted by it against the second respondent, employee which were chaired by the first respondent, a duly admitted attorney practising under the name and style of MSM Incorporated. The applicant in the alternative seeks an order declaring that the aforesaid disciplinary proceedings are null and void and of no force and effect and be instituted de novo.

Facts in brief:

The first respondent had found the second respondent guilty of two acts of corruption; accepting a gift/reward/favour in breach of the Local Government Systems Act 32 of 2000 (the Systems Act); disclosure of confidential and/or privileged information and gross negligence regarding the performance of his duties. The

-----LABOUR NEWS-----

corruption charges relate to having requested R2 000 000.00 from a tenderer in a tender process and the payment of R5 000.00 from the said tenderer. Before the first respondent had issued a sanction, the second respondent brought an application for his recusal. The recusal application was opposed by the applicant. After the first respondent had refused to recuse himself, the second respondent filed a High Court application for his recusal. Before the High Court application could be heard, the first respondent issued a sanction. On the corruption charges he ordered that the second respondent not receive any increment in his current position as disaster manager for twelve months commencing August 2006 to August 2007. Further that he should for two years not be involved in the tender process or awarding of any tender whilst employed. He was ordered to repay the sum of R5 000.00 to the tenderer. The second respondent thereafter withdrew his High Court application.

The applicant felt aggrieved with the sanction imposed and brought this application.

Serious allegations are made against the first respondent who has decided not to oppose this application. A copy of this application was served by the Sheriff of the High Court on the first respondent's firm on 7 December 2007 and on the second respondent's attorneys on 1 December 2007. The second respondent is opposing the application.



-----LABOUR NEWS-----

The review and declarator application:

The applicant was unhappy with the sanction imposed by the second respondent and brought this application in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 (the Act).

Analysis of the facts and arguments raised:

The court held that the facts in this matter are in the main common cause. The first respondent is an admitted attorney. He was appointed by the applicant's municipal manager to preside in a disciplinary hearing where the first respondent was charged with misconduct. He found him guilty of some charges and had adjourned the hearing to hear submissions on the issue of sanction. Unbeknown to the applicant, the first respondent met with Govender whom he described as a lieutenant, foot soldier and financier of the second respondent on 9 May 2006. They discussed their proposed business venture and the second respondent's case. This discussion took place before the first respondent had made a finding on the misconduct charges. The first respondent had also met the second respondent at Carnival City. The first respondent indicated to the second respondent that he has not been sleeping as a result of the matter, and after he had given the matter careful consideration, he told him not to worry and that he would only find him guilty of a minor charge. On this basis, he informed him that in passing sentence, he would penalise him by possibly passing a sentence in terms of which he would return to his employment and would lose possibly one week's



-----LABOUR NEWS-----

pay or alternatively, would indicate that he was to receive no increase in salary for twelve months. The second respondent told the first respondent that his legal representative was not conducting the matter in a manner that was to his approval. The first respondent told him that it was not in his best interest to change his legal counsel and that he was not to worry for the reasons outlined above.

The findings were made available. After he received the reasons for judgement, and noticed that he had been found guilty on some charges, the second respondent became suspicious regarding the discussions that he had with the first respondent.

The second respondent applied for the first respondent's recusal which was opposed by the applicant. The first respondent refused to recuse himself, heard submissions on the issue of sanction and reserved his findings. A High Court review application was served on him and before it was heard he issued a ruling on sanction. The sanction issued is in line with the promises that he had made to the second respondent in his discussion with him at Carnival City. On the corruption charges, he ruled that he should not receive any increment in his current position for 12 months. On the other charges he ordered that he should for two years not be involved directly or indirectly with the tender process and that he repay R5 000.00 to Nkonyane. After the sanction ruling was issued, the second respondent withdrew the High Court application on 22 August 2006.



-----LABOUR NEWS-----

The first respondent's conduct in this matter cannot be condoned at all. He had failed dismally to act as an impartial chairperson of the disciplinary tribunal. He had discussed the matter with what he termed with the second respondent's "financial backer, lieutenants and foot soldiers" and with the second respondent. He had also promised that the second respondent's services would not be terminated although he had found him guilty of serious misconduct including corruption.

The applicant's conduct in this matter is also shocking. It had an opportunity to have supported the application for the first respondent's recusal. It was provided with an affidavit and various correspondences between the first respondent and Govender. The second respondent had also dealt with his encounter with the first respondent at Carnival City. The first respondent had not opposed or denied the allegations made against him. The applicant was clearly driven by expediency not to support the recusal application.

The applicant is clearly unhappy with the sanction imposed by the first respondent on the second respondent. It does not take issue with the conviction. The second respondent contended that the applicant as an employer could not review its own decision. The applicant contended that an employer could review its own decisions. It



-----LABOUR NEWS-----

was contended by the applicant that when an administrative act has been performed irregularly - be it as a result of an administrative error or other circumstances - then, depending on 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. The applicant is an organ of State and the holding of a disciplinary enquiry by an organ of State constitutes administrative action. It was contended that section 158(1)(h) of the Act grants the Labour Court the power to review any decision taken or act performed by the State in its capacity as employer. The present case is one in which the applicant would be bound to have what appears to be corrupt disciplinary proceedings set aside. In particular, the applicant is bound to provide democratic and accountable government for local communities; to pursue disciplinary proceedings against an official accused of financial misconduct; to follow procurement procedures which are fair, equitable, transparent, competitive and cost-effective. The conduct of the respondents tugs at the very heart of democracy, fairness and transparency.

This Court had in the matter of MEC for Finance (KZN) and another vs Dorkin and another under case number D505/2002 delivered on 18 May 2005, found that the State as an employer could not review its own decisions in terms of section 158(1)(h) of the Act.



-----LABOUR NEWS-----

This decision was overturned on appeal in the matter of Member of the Executive Council for Finance, KwaZulu - Natal & another v Dorkin NO & another (2008) 29 ILJ 1707 (LAC). The LAC had found that in the case of a State entity, as a general principle, it was in the public interest that it, as an employer, be able to reverse a sanction incorrectly imposed. The LAC found that because conduct of compulsory arbitrations relating to dismissal under the Act constituted administrative action, then the conduct of disciplinary hearings in the workplace where the employer is the State, constituted without any doubt administrative action which is required to be lawful, reasonable and procedurally fair. This judgment was delivered on 21 December 2007 and referred to the Sidumo judgment which was delivered on 5 October 2007 as justification why disciplinary hearings are administrative actions. The Sidumo judgment did not deal with the review of disciplinary hearings but compulsory awards under the Act.

It would appear that the LAC was not referred to the judgment of the Constitutional Court in Chirwa v Transnet Ltd and others (2008) 29 ILJ 73 (CC) which was delivered on 28 November 2007 which was approximately three weeks before its decision. Chirwa conclusively decided that the decision to dismiss an employee, even when taken by an organ of State, does not amount to administrative action that is reviewable, either in terms of section 33 of the Constitution or the Promotion



-----LABOUR NEWS-----

of Administrative Justice Act No 3 of 2000 (PAJA). The Court held that it was no longer necessary to treat public sector employees differently and subject them to the protection of administrative law. There was no longer a distinction between private and public sector employees under our Constitution. There was no reason in principle why public sector employees who fall within the ambit of the Act should be treated differently from private sector employees and be given more rights than private sector employees.

The court held that it was of the view that the fact that Ngcobo J held in Chirwa that a decision to dismiss a civil servant involves the exercise of a public power is of no moment, since it does not follow that such decision constitutes administrative action that is reviewable in terms of the Constitution or PAJA.

The Constitutional Court had previously decided in *Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Tourism and others* [2004] ZACC 15; 2004 (7) BCLR 687 (CC) that the law of administrative review is now codified in PAJA and there is no residual common law review of such decisions remaining. Even if it could be contended that section 158(1)(h) of the Act was of application to this matter and whatever its proper scope of application, it clearly does not extend to



-----LABOUR NEWS-----

reviewing dismissals or disciplinary proceedings of public employers in terms of PAJA. This is the basis relied upon by the applicant for its grounds of review in this matter. Since there is no other residual common law ground remaining, the applicant can no longer attempt to fashion some form of cause of action under section 158(1)(h) of the Act by falling back on the Constitution. In *Frederick and others v MEC for Education and Training Eastern Cape and others* [2001] ZACC 6; 2002 (2) BCLR 113 (CC), it was held at paragraph 43:

“Whatever the precise ambit of s 158(1)(h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the State acting in its capacity as employer. Given the express conferral of jurisdiction in such matters by s 157(2), it would be a strange reading of the Act to interpret s 158(1)(h) read with s 157(1) as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by s 157(2). Section 158(1)(h) cannot therefore be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient, when read with s 157(1) to exclude the jurisdiction of the High Court.



-----LABOUR NEWS-----

The review application was brought in terms of section 158(1)(h) of the Act. It is clear from the authorities cited above that no other cause of action on which to build a review exists in our law. This conclusion was endorsed in *Transman (Pty) Ltd v Dick and another* (2009) 30 ILJ 1565 (SCA) where it was held inter alia there was no need to permit a challenge based on the judicial review in employment dismissals. See also *Kriel v LAB* (2009) 9 BLLR 854 SCA and *Makambi v MEC for Education, Eastern Cape* (2008) 8 BLLR 711 (SCA).

The court held that the application stands to be dismissed.

The applicant is not left without remedies. There are a number of cases dealing with what remedies are available to it. The following was said in *MEC for Finance, KZN and Another*

“In *BMW (SA)(Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC) the majority held that an employer has a right to subject an employee to a second disciplinary enquiry on the same issue in respect of which he has already been found guilty and has had a sanction imposed upon him when ‘it is, in all the circumstances, fair to do so’, (see *BMW (SA) (Pty) v Van der Walt* at



-----LABOUR NEWS-----

117G-H para 12) but in the last sentence of the same paragraph it was stated that '[i]t would probably not be considered to be fair to hold more than one disciplinary enquiry save in exceptional circumstances' that cannot be absolute as there may be exceptional circumstances in which every reasonable person would agree that senior authorities in an organization, particularly a government department, must be able to intervene to reverse a decision on sanction reached by a chairman of a disciplinary enquiry who has been appointed by them. A good example in this regard is whether the decision reached by the chairman of the enquiry has been induced by corruption. In the public interest this had to be so. However, the courts will have constantly to endeavour to ensure that the right of senior authorities in such an organization to reverse or approach a court to reverse such a decision on sanction."

