

SOUTH AFRICA / JUDGMENT

Endumeni Local Municipality v Mbatha and Another (D117/2021) [2021] ZALCD 73 (17 August 2021)

[2021] ZALCD 73

COURT

Labour Court Durban

BEFORE

Naidoo

CASE / FILE NUMBER

D117/2021

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, DURBAN****Not****Reportable****Case No: D117/2021****In**

the matter between:

ENDUMENI
LOCAL
MUNICIPALITY Applicant
and
JABULANI
ARON
MBATHA First
Respondent
ADVOCATE THOKOZANE P
QWABE Second
Respondent
Heard: 17
August 2021

Delivered: This

judgment was handed down electronically by circulation to the
parties' legal representatives by email by the Registrar. The
date

and time for handing-down is deemed 10h00 on date on which the email
is sent to the parties by the Registrar.

Summary: Unopposed

Review

JUDGMENT

NAIDOO, AJ

[1] This is an application to review and set aside the decision of the Second Respondent in terms of s158(1)(h) of the Labour Relations Act[1] ("LRA).

[2] The application is unopposed.

Material background facts

[3] The First Respondent was employed by the Applicant on 1 October 2008 as its Sports and Recreation Officer.

[4] On 31 January 2020, the Applicant preferred four disciplinary charges against the First Respondent arising from his conduct during the period 16th to 18th December 2021. The First Respondent was charged in terms of provisions of the Disciplinary Procedure Collective Agreement as follows:-

4.1 Charge 1 – Abuse of Municipal Vehicle

It is alleged that, on or about 16 December 2019 (17h28) to 17 December 2019 (08h30), you were operating a Municipal vehicle, Isuzu KB 250 (Double Cab), Registration No. NDE 10093, without authorization or a valid reason to do so, when you travelled to Hattingspruit; Springbok; Dannhauser; Sithembile; Fouche Street, and Poplar Crescent: Forrestdale. The official and authorized trip had terminated on 16 December 2019 at approximately 16h31, and the Municipal vehicle ought to have been returned and parked at the designated parking area within a reasonable time after the official trip had terminated.

Your conduct is in violation of paragraph 1.2.5 and 1.2.10 of Annexure to the Disciplinary Procedure Collective Agreement.

Alternative to Charge 1 – Gross Negligence

It is alleged that, on or about 16 December 2019 (17h28) to 17 December 2019 (08h30), while the Municipal vehicle was entrusted in your care, you failed to take reasonable steps to prevent its abuse, to wit. Isuzu KB 250 (Double Cab), Registration No. NDE 10093, which resulted in your brother gaining access to it and travelling without authorization, to Hattingspruit; Springbok; Dannhauser; Sithembile; Fouche Street; Poplar Crescent: Forrestdale.

Your conduct is in violation of paragraph 1.2.10 and 2.7.6 of Annexure to the Disciplinary Procedure Collective Agreement.

Charge 2 – Bringing the Image of Endumeni Local Municipality into Disrepute

It is also alleged that, on or about 17 December 2019, and at approximately 00h23, you parked or caused for the Municipal vehicle (Isuzu KB 250 (Double Cab), Registration No. NDE 10093) to be parked, at a known liquor outlet, to wit. Sithembile liquor store.

Your conduct referred to above, caused for the image and the credibility of Endumeni Local Municipality to be brought into disrepute.

You have thus contravened Annexure A of the Disciplinary Procedure and Code Collection Agreement, paragraph 1.2.4 and 2.7.7.

Charge 3 – Failure to Request leave in Advance / Uncommunicated Absence

It is alleged that, on or about 17 December 2019 you failed to report for duty, and you had no permission from your superior as you had not applied for, nor were you granted leave for the day in question, nor did you have valid reason to do so.

Your conduct is in violation of paragraph 1.2.1 and 1.2.6 of Annexure to the Disciplinary Procedure Collective Agreement.

Charge 4 – Failure to Request leave in Advance / Uncommunicated Absence

It is further alleged that, on or about 18 December 2019 you failed to report for duty, and you had no permission from your superior as you had not applied for, nor were you granted leave for the day in question, nor did you have any valid reason to do so.

[5] The Second Respondent was appointed as the Presiding Officer of the disciplinary hearing convened in respect of the above charges. At the commencement of the hearing, the First Respondent pleaded guilty to charges one and two. As a result, evidence was led on charges three and four only.

[6] The Second Respondent found the First Respondent not guilty of charges three and four. In summary, his reasons are the following:

6.1 It is common cause that the First Respondent was absent from work on 17 and 18 December 2019.

6.2 It was not disputed and therefore common cause that the First Respondent had lost his cell phone and was therefore unable to report his absence to his employer.

6.3 It was not disputed and therefore common cause that the First Respondent was absent because he was attending to his sickly wife.

6.4 The First Respondent did not memorise his supervisor's cellphone number and his failure to report his whereabouts on 17 and 18 December 2019 was not deliberate or due to negligence on his part.

6.5 The First Respondent's explanation was reasonable and he had a valid reason for his absence.

[7] Both parties were called upon to submit mitigating and aggravating factors in respect of charges one and two.

[8] The First Respondent's representative presented the following in mitigation:-

"The causation factor which led to this case of misuse of Municipal vehicle is the incompetent manager who failed to follow up on abruptly stopped car allowance for the accused.

Then SAMWU is praying for a 3 month written warning for our member".

[9] In summary, the Applicant made the following submissions in aggravation of sanction:

9.1 The First Respondent was found guilty of serious charges of misconduct which rendered the employment relationship intolerable.

9.2 The First Respondent did not immediately own up to his actions and the wrongfulness thereof. He tried to conceal the truth by blaming his brother.

9.3 The First Respondent remained defiant throughout the hearing, failed to take responsibility for his actions and showed no remorse.

9.4 His conduct has caused an irretrievable breakdown in the trust relationship which rendered continued employment intolerable.

9.5 Dismissal was the only appropriate sanction.

[10] The Second Respondent imposed a sanction of a final written warning, applicable for six months ("the decision").

[11] It is this decision that the Applicant seeks to impugn on the basis that:-

11.1 it is implicit in the Second Respondent's findings that he accepted the Applicant's version and rejected the First Respondent's version.

11.2 the Second Respondent's finding that the working relationship has not broken down irretrievably is inconsistent with the evidence which demonstrated the First Respondent's dishonesty, lack of remorse and what appeared to be vindictive and retaliatory conduct on the part of the First Respondent.

11.3 the Second Respondent overlooked charge two and thereby failed to consider the gravity of the offence and the reputational damage caused to the Applicant as a result of the First Respondent's conduct.

11.4 the Second Respondent misdirected himself in relation to the issue of consistency with a previous sanction of dismissal.

[12] The Applicant further submitted that the First Respondent's dishonesty can be inferred from the undisputed tracking report which confirmed that the Applicant returned the vehicle to the official parking garage on 17 December 2019 at approximately 8.30. This is inconsistent with the with Applicant's evidence under cross-examination that he was out of town on 17 and 18 December 2019 as he had taken his wife to a traditional healer. This was a material aspect of the evidence that was not considered by the Second

Respondent in determining the issue of sanction.

The Legal Position and

Analysis

[13] Section 158(1)(h) provides as follows:

'The Labour Court may ... review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

[14] The applicable basis of a review application in terms of Section 158(1)(h) has been described in *Hendricks v Overstrand Municipality & another*[2], as follows:

[28] Besides being entitled to bring a review in terms of the common law, as I have explained, the first respondent is equally entitled to review the decision of the presiding officer on the ground of non-compliance with the constitutional principle of legality. As with review under PAJA such a review, based on the principle of the rule of law in section 1(c) of the Constitution, requires the decision to be categorised as an exercise of public power, which for the reasons already stated I accept that it is. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.

[29] In sum therefore, the Labour Court has the power under section 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on i) the grounds listed in PAJA, provided the decision constitutes administrative action; ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or iii) in accordance with the requirements of the constitutional principle of legality, such being grounds "permissible in law".

[15] In *Democratic Alliance v President of the Republic of SA & others*[3], Yacoob ADCJ held:

"If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole."

- [16] The Applicant relies on the principle of legality, which, as set out above, is indeed contemplated as a proper basis for a review application under Section 158(1)(h) of the LRA.
- [17] The Second Respondent made a number of damning findings in relation to the First Respondent's defence as well as the lack of remorse on his part.
- [18] He also found that the charges of misconduct were serious and "attract the sanction of dismissal" and that the First Respondent did not even attempt to mitigate the outcome of the sanction.
- [19] I am persuaded that such findings are inconsistent with his ultimate finding that the First Respondent's conduct did not result in an irretrievable breakdown in the employment relationship.
- [20] An added factor is that the Second Respondent's findings do not include a consideration of the impact of charge two or the inconsistency in the First Respondent's version regarding his whereabouts on 17 December 2019.
- [21] Although I am satisfied that the Second Respondent's decision is irrational and cannot stand based on the evidence before him, the Applicant's counsel is in agreement that there is insufficient evidence before this court to enable it to substitute the sanction with one of dismissal.
- [22] In those circumstances, it would be prudent to remit the matter to the Applicant for a proper determination on the issue of sanction.

I accordingly grant the following order:

- [1] The decision of the Second Respondent dated 5 October 2015, in which he imposed a sanction of a final written applicable for six months, is reviewed and set aside.
- [2] The matter is remitted to the applicant for a fresh determination on the appropriate sanction.

LR Naidoo

Acting Judge of the Labour Court of South Africa

[1] 66 of 1995

[2]

(2015) 36 ILJ 163 (LAC)

[3] 2013 (1) SA 248 (CC) at para 39

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Prepared on 13 October 2026 · Esheria