

SOUTH AFRICA / JUDGMENT

# Garden Route District Municipality v Mqota-Tshiki (C521/2022) [2024] ZALCCT 46 (8 October 2024) [2024] ZALCCT 46

## COURT

Labour Court Cape Town

## BEFORE

Daniels

## CASE / FILE NUMBER

C 521/2022

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## THE

LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 521/2022

## In the matter between:

THE

GARDEN ROUTE DISTRICT MUNICIPALITY

Applicant

And

SIMILE

MQOTA-TSHIKI

First

Respondent

TRIX

HOLTZHAUSEN N.O.

Second

Respondent

Date

of Hearing: 27 June 2024

Date

of judgment: 08 October 2024

This judgment was handed

down electronically by circulation to the parties' legal

representatives by email, publication on

the Labour Court website and

release to SAFLII. The date and time for handing down judgment is

deemed to be 10h00 on 09 October

2024.

Summary: Section 158(1)(h) of the LRA – Review application of an internal disciplinary appeal chairperson's finding to reinstate an employee dismissed for fraud and gross dishonesty and the breach of the Code of Conduct for Municipal Officials. Irrational and unreasonable decision reviewed and set aside.

## JUDGMENT

DANIELS AJ

## INTRODUCTION

1] This judgment is concerned with an application to review and set aside the second respondent's ruling, issued in her capacity as the internal disciplinary appeal chairperson, to reinstate the first respondent, Ms Mqota-Tshiki (the employee) and to instead impose a final written warning valid for 12 months coupled with ancillary relief referred to in more detail below. The review application is brought in terms of section 158(1)(h) of the Labour Relations Act[1] on the basis that the decision of the internal disciplinary appeal chairperson's (the appeal chairperson) decision to reinstate

the first respondent, a public sector employee found guilty of fraud and gross dishonesty, is a decision that a reasonable decision maker could not reach.

2] I deal first with the preliminary issue as to whether this application was brought within a reasonable time coupled with the condonation application and thereafter the merits of the review application.

## PRELIMINARY ISSUES

3] There is one preliminary issue regarding condonation for the late filing of the review application.

4] The applicant (the Municipality) contends that it has brought the application within a reasonable time. To the extent necessary the Municipality has applied for condonation for the late filing of the review application. The application has been launched five months after the appeal chairperson's ruling. In the answering affidavit the employee opposed the condonation sought. This opposition was however withdrawn and the objection to condonation abandoned at the commencement of the hearing. This was confirmed by Mr Geldenhuys who appeared for the employee.

5] There is no statutory time limit for instituting a review application in terms of S158(1)(h) of the LRA and the application therefore had to be brought within a reasonable time. This is now trite.

[2]

6] In its founding affidavit the Municipality has set out the timeline within which it took the decision to review the appeal chairperson's

findings, when it instructed its first set of attorneys, when the second legal team was instructed and that the review application was launched as expeditiously as possible and within a reasonable time. In summary, the Municipality received the appeal outcome on 31 May 2022 and resolved to review the decision on 22 June 2022 and briefed the first set of attorneys on 13 July 2022. The Municipality then briefed a second set of attorneys on 26 August 2022 after the delay by the first attorneys to launch the review application.

7] The review application was eventually launched on 27 October 2022, two months after it instructed its attorneys of record. Given the delay of five months in launching the application, the Municipality correctly sought condonation[3].

8] The explanation for the delay is in my view satisfactory, the delay is not egregious and as will become apparent the Municipality has good prospects of success. In addition, the employee did not pursue the objection to condonation.

9] I have accordingly assessed the condonation application in light of the factors outlined in *Melane v Santam Insurance Co Ltd*[4] and subsequent authorities of this Court and the Constitutional Court[5]. I find that it would be in the interests of justice to grant condonation as sought by the applicant.

#### MERITS OF THE REVIEW APPLICATION

10] The essential issue in dispute in this case involves the review of the decision of the appeal chairperson tasked with determining the appeal against the finding and sanction of dismissal consequent upon the finding of guilt for misconduct involving gross dishonesty following a disciplinary hearing.

11] The appeal chairperson imposed a sanction less than dismissal, being a final written warning and essentially overturned the sanction of dismissal of the internal disciplinary hearing. The Municipality being aggrieved by this sanction applied to have it set aside on review on the basis that the decision is one that no reasonable decision maker would reach. The employee opposed the relief sought on the basis that the appeal chairperson's decision was reasonable and rational.

12] The first respondent is employed as Deputy Manager: Construction in the Roads and Transport Planning Department at Garden Route District Municipality since March 2019. The employee is accordingly a senior official in the Roads and Transport Planning Services. The employee's job description as the project manager for the reseal (Dense Seal) project was clear and her duties included exercising effective control of layer works, budget structure and the reseal budget. As per the record of the internal appeal, it was not disputed that the legislative statutory powers set out in the employees job description included the Municipal Finance Management Act[6] and the Garden Route District Municipality Supply Chain Management Policy (the SCM Policy). All municipal officials and those responsible for procurement of goods and services are bound by this legislative framework.

13] The employee was charged with the following: 1) fraud and gross dishonesty; 2) bringing the Municipality's name into disrepute;

3) gross negligence; 4) causing irregular, fruitless and wasteful expenditure and 5) breach of the code of conduct for municipal staff. A disciplinary hearing was held between 20 October 2021 and 8 February 2022 and the employee was found guilty of charges 1, 3, 4 and 5, and dismissed.

14] The employee exercised her right to appeal the finding and sanction of dismissal. The appeal chairperson after considering the arguments during the internal appeal hearing and the evidence, found the first respondent guilty of charges 1 and 5. Charge 1 relates to fraud and gross dishonesty in that she contravened the Supply Chain Management (SCM) policy of the Municipality by declaring that all of the goods were received by issuing a GRV and processing full payment. The appeal chair in her findings further stated that the charge concerns the act of fraud committed on 28 June 2021 when Mrs S

Mqota-Tshiki processed a payment to the amount of R759 436.21 to Dense Seal for supplying goods not fully delivered and resulting in a loss to the Municipality. The appeal chairperson found that this was a clear contravention of the SCM policy. Charge 5 related to the employees breach of the Code of Conduct for Municipal staff and the appeal chairperson found that the employee has indeed breached the code of conduct for Municipal staff as follows:

i.a staff member of the Municipality must always lawfully execute the lawful policies of the Municipal Council. The SCM Policy of Council was breached when a GRV was processed for the full value of the goods whereas only a portion of the goods were received.

ii.a staff member of the Municipality may not use the position or privileges of a staff member to improperly benefit another person.

The service provider in this case did receive the full payment for goods not delivered in full.

15] The appeal chairperson, after considering the submissions on sanction, set aside the sanction of dismissal imposed by the internal disciplinary chairperson and instead reinstated the first respondent imposing a final written warning valid for 12 months and further that the first respondent be enrolled in a formal supply chain management and good governance course facilitated by the training section within the Human Resources Department of the Municipality. The appeal chairperson also recommended formal counselling to promote teamwork and to establish good working relationships going forward.

16] The Municipality seeks to review the appeal chairperson's decision on the following grounds:

1. The appeal chairperson failed to give clear reasons for her findings on sanction and failed to explain how she weighed and balanced all the evidence;
2. failed to properly, rationally and justifiably apply her mind to the facts or the law in this matter;

3. acknowledged that fraud and gross dishonesty justifies dismissal on the first occasion: 'charges brought against Mrs S Mqota-Tshiki must be regarded as very serious and the subsequent sentence of dismissal was handed down in alignment with Circular 01/2018 Disciplinary Procedure Collective Agreement'
- but then ignored this and in total contradiction-ordered a reinstatement without giving any express reasons
4. failed to consider the impression and also to the taxpayers in their area;
5. decided to reinstate the employee found guilty of fraud-which is a finding that no reasonable decision maker could make in these circumstances-particularly aggravated by the facts that the employee showed no remorse for her fraudulent and dishonest misconduct;
6. conducted the appeal hearing in a manner that was procedurally unfair in that the employee breached clause 17.11 of disciplinary agreement, in failing to give the municipality her statement of case at least two days prior to the hearing
7. failed to consider crucial evidence raised by the municipality that related to charge 4 in that (1) a motivation was needed to motivate for a more expensive service provided and that (2) there was an alternative service provider available,
8. failed to apply the relevant law, policy and ethical code to her reasoning and outcome, which framework was expressly set out in the municipality's submissions, and
9. failed to consider the aggravating factors in support of the employee's sanction of dismissal, given the seriousness of the charges of fraud and dishonesty, gross negligence, causing irregular, fruitless and wasteful expenditure and breach of code of conduct for municipal officials.

17] The Municipality further contends that the appeal chairperson's major misdirection was her failure to consider the totality of evidence which had a distorting effect on the outcome of her award. In this regard the Municipality alleged that the appeal chairperson failed to:

- 1) undertake a balanced assessment of the fairness of the sanction of dismissal, and placed the employee's interests above those of the employer;
- 2) properly evaluate the gravity of the employee's misconduct;
- 3) uphold the sanction of dismissal despite the employee's misconduct involving fraud and gross dishonesty; consider all the aggravating factors advanced by the Municipality; and 5) consider that the employee showing no remorse was a strong aggravating factor that favoured the sanction of dismissal.

18] It is common cause that the first respondent was charged with 5 allegations of misconduct and that the appeal chairperson confirmed guilt on charges 1 and 5. The most serious aspect of the misconduct charges is the fraud and gross dishonesty with which the employee was found guilty coupled with the confirmation of the finding of the employee's breach of the SCM policy

for the Municipality and failure to respect both the Municipal Finance Management Act and the SCM policy. This misconduct alone is serious enough to warrant dismissal, even on the first occasion.

19] As stated above, the Municipality contends that the decision by the appeal chairperson to reinstate the first respondent found guilty of fraud and gross dishonesty is a decision that a reasonable decision-maker could not reach[7] and in the circumstances the only appropriate sanction would be dismissal.

20] On the other hand, the employee contends that the appeal chairperson applied her mind to all the information placed before her and reached a reasonable and rational decision

21] The employee, being in a senior management position was evidently aware of the Municipality's SCM policy, yet there was a clear contravention of this policy when the first respondent declared that all goods were received by issuing a GRV and processing of full payment when all goods were in fact not received. The first respondent acknowledged these facts and thus admitted the contravention not only of the SCM policy, but the record also illustrates that the first respondent therefore misrepresented the true facts and failed to take responsibility for her conduct seeking to attribute blame to other employees within the Municipality. The first respondent had the option of issuing a partial GRV note for the products delivered and the equivalent rand value thereof. She did not do so. In addition, the first respondent continued to make her own arrangements with the service provider. It is on this basis that the appeal chairperson upheld the guilty finding in relation to the charge of fraud and gross dishonesty.

22] The second charge which was upheld by the appeal chairperson is that of a breach of the Code of Conduct for Municipal staff (charge 5). This is linked to the first charge as it relates to the policies of the Municipality and the legislative framework applicable to the procurement of goods and services in the Municipality. The appeal chairperson found that the first respondent indeed breached the code of conduct for municipal staff.

23] In deciding on an appropriate sanction and imposing a sanction less than dismissal, the appeal chairperson considered the submissions made in respect of an appropriate sanction and reasoned as follows, which I quote from the appeal hearing outcome, given the arguments made by the Municipality in respect of the irrationality and unreasonableness of the appeal chairperson's reasons which underpin the sanction imposed in relation to the findings of guilt and the seriousness of the misconduct charges:

*" 25.1 disciplinary procedure collective agreement is clear on the following:*

*"6.2. Disciplinary action shall be implemented fairly, consistently, progressively and promptly";*

25.2 No evidence could be found in the file of Mrs S Mqota-Tshiki of any

previous history of informal and formal disciplinary processes against her in relation to the current case or any other matters. This can also be regarded as the first offence documented.

25.3 However, I take note with concern that according to submissions made,

Mrs S Mqota-Tshiki did not show any remorse during the proceedings but instead blamed other officials for her transgressions. As a senior official in the Roads and Transport Planning Services, you are always required to exhibit ethical behavior and to set an example for your subordinates in adhering to all legislative requirements and policies of council.

25.4 The chairperson takes note of the fact that Mrs S Mqota-Tshiki was the project manager for the Dense Seal project and according to her job description she must execute effective control of layer works, budget structure and reseal budget. It is expected that a senior manager will always respect the legislative requirements (MFMA) and SCM policy of the Municipality.

25.5 The chairperson is of the opinion that although Mrs S Mqota-Tshiki has failed to execute her responsibilities in accordance with the legislative and policy requirements, the delegated authority in the matter of choosing the most expensive service provider could not only be assigned to her. Her delegated financial responsibility is R30 000.00 and recommendations are made to HOD and other relevant roleplayers to intervene and refer back for clarification and motivation. Other officials within the department were aware of the situation and could have reported to the HOD for attention.

25.6 Although the charges brought against Mrs S Mqota-Tshiki must be regarded as very serious and subsequent sentence of dismissal was handed down in alignment with circular 01/2018 disciplinary Procedure Collective Agreement, the chairperson considered all the relevant factors for appeal against the sentence submitted by the appellant and the respondent's argument on the ground for dismissal."

24] In argument before the Court and in its heads of argument the applicant relied extensively on the judgments of the Labour Appeal Court in *Hendricks v Overstrand Municipality*[8] and that of *Ntshangase v MEC for Finance, Kwa-Zulu Natal and Another*[9]. Both these cases involve the review of the decisions of an internal disciplinary appeal ruling and acts of misconduct within management

of an organisation involving elements of dishonesty.

25] In casu this review application similarly involves an internal appeal ruling of a disciplinary hearing where the appeal chairperson upheld the findings of guilt on the charge of fraud and gross dishonesty and a breach of the Code of Conduct for Municipal Staff. These are very serious charges which implicate dishonesty, one of the charges itself being fraud and gross dishonesty. As stated in *Hendricks v Overstrand Municipality* dishonesty in any organization, especially amongst employees at senior management level will impact negatively on the culture and probability of the said organization[10].

26] The misconduct was linked to the employees' duties as a senior official in the Roads and Transport Planning Department within the Municipality, whilst the first respondent, although correctly, cannot be held solely responsible for approving the most expensive service provider given that her delegated financial responsibility was R30 000,00, this does not detract from the seriousness of the charges with which the first respondent was found guilty. This was acknowledged by the appeal chairperson in her ruling.

27] Ms Ristic emphasized in argument that the charges were serious and involved fraud at a Municipality and that the appeal chairperson's findings in respect of the charges and the reasoning in respect of the reinstatement is contradictory in that the result and reinstatement of the first respondent is incapable of justification. Ms Ristic also highlighted that the appeal chairperson noted with concern that the first respondent showed no remorse, which goes against a finding of reinstatement. Consequently, the result and reasons are therefore unreasonable. The applicant also argued that the appeal chairperson failed to consider the rights and interests of the Municipality and appears to have felt sorry for the first respondent as the employee.

28] The applicant relied on the conclusion of the late Steenkamp which appears at paragraph [41] of *Hendricks v Overstrand Municipality* and which the Labour Appeal Court cited in full. It is not necessary to cite it here again. On the basis of this judgment the applicant

implored this Court to apply the reasoning therein and to find that the appeal chairperson's finding should be reviewed and set aside as unreasonable and irrational and to substitute it with the decision made to dismiss the first respondent.

29] Mr Geldenhuys for the first respondent, in summary, argued that the appeal chairperson's finding was a reasonable one and that it must be seen as fair and rational. He also argued that the sanctions for misconduct as contained in annexure "A" to the Collective Agreement[11] is a guideline only and does not have to be strictly applied. The point sought to be made by Mr Geldenhuys is that the charges relate to supply chain management and that it is merely non-compliance with these policies and that every SCM issue cannot lead to a dismissal. He submitted further that the appeal chairperson's findings on sanction amounts to progressive discipline.

30] Mr Geldenhuys attempted to distinguish the cases of *Hendricks* and *Ntshangase* on the basis that those cases were clear examples of fraud whereas this case involved non-compliance with supply chain management policies and that the charges (fraud and gross dishonesty) relate to the SCM policies. He went as far as submitting that the finding of guilt was not upheld by the appeal chairperson in respect of the first charge when one considers paragraph 24.3 of the appeal finding. The Court was also referred to paragraphs 47 and 48 of the internal disciplinary finding in a further attempt to persuade the Court that there is no guilty finding on charge 1 and that the first respondent is not guilty of fraud and gross dishonesty but only that the first respondent did not follow the SCM procedures. In conclusion, it was submitted that the first respondent is only guilty of charge 5 and therefore it was reasonable and rational for the appeal chairperson to overturn the findings and sanction of the internal disciplinary hearing and reinstate the employee.

31] In reply Mrs Ristic pointed out that on the papers[12] there is a clear admission that the appeal chairperson confirmed guilt in respect of charges 1 and 5. It is therefore common cause that the first respondent was found guilty of these two charges.

32] On a proper reading of the appeal chairperson's finding, I am not persuaded that the first respondent was found not guilty of charge 1 in relation to fraud and gross dishonesty. It is abundantly clear that the first respondent's conduct as set out at paragraphs 24.3 and 24.4 of the appeal finding, amounted to fraud and gross dishonesty as detailed therein. I have already stated that these are very serious charges. There appears to be a lack of appreciation on the part of the first respondent of the implications of her conduct on the employment relationship and the significance of not following the supply chain management policy, in particular with regard to partial delivery and payment of goods and the legislative framework which underpins the said policy. The first respondent issued a GRV which indicated that all goods were received and made her own arrangements with the service provider contrary to the supply chain management policies and effectively the legal framework for procurement of goods and services within government departments.

33] The first respondent knew that she was acting contrary to the policies and must have known that her conduct was contrary to the Code of Conduct for Municipal staff as she is in a management position. The most serious aspect of the misconduct is the element of dishonesty.

34] Ms Ristic correctly argued on the basis of the cases cited above[13], that the Municipality had a duty to ensure accountable and clean governance to its ratepayers and that dismissal is ordinarily the only reasonable sanction when it comes to fraud in the public institutions. The appeal chairperson also failed to take into account by failing to follow the SCM policies the employee undermined the regulatory framework for the procurement of goods and services in government, which has its objective of ensuring procurement practices which are fair, equitable, transparent, competitive and cost-effective. This is implied in the nature of the conduct and charges.

35] Whilst the Court notes that the first respondent has a clean record, in other words no previous record of disciplinary action being taken against her, little weight can be attached to this as a mitigating factor, and it cannot override the seriousness of the nature of the charges and the element of dishonesty therein in the circumstances of this case.

36] I agree with the Municipality, that the appeal chairperson's reasoning and finding on sanction appears to be irrational and unreasonable in light of the guilty findings on the charges 1 and 5 as detailed above. It appears that the appeal chairperson did not properly apply her mind to the issue of an appropriate sanction in the present circumstances of this matter. The employee was found guilty of gross dishonesty which charge had little to do with her competency as a manager or her lack of training in respect of her position. This was not the case put forward on behalf of the employee, which would have warranted a sanction along the lines of further training. There was no evidence or argument that training was insufficient or that the first respondent was not familiar with the SCM policies, her management role and competencies and functions. Training

would therefore be of no use to the first respondent. I also find it difficult to reconcile the appeal chairperson's finding of guilt in respect of the two charges, which amounts to serious misconduct, with the reasoning on sanction and the consequent sanction imposed.

37] In *Toyota SA Motors (Pty)Ltd v Radebe & others*[14], Zondo AJP as he then was, found that gross dishonesty ranks amongst one of the extreme cases of serious misconduct which an employee may make himself guilty of.[15] The learned judge further held that the Code of Good Practice under the LRA contemplates dismissal for a first offence where the

misconduct is of a serious nature and one such example is that of gross dishonesty.[16] The Labour Appeal Court has also held that dismissal is a rational response to risk management in the affected enterprise.[17]

38] I accordingly find that the decision by the appeal chairperson to impose a sanction short of dismissal, on the facts of this case and in the face of a finding of guilt in respect of charges of fraud and gross dishonesty and by implication caused a breakdown of the relationship of trust, is one that no reasonable decision maker could reach in the circumstances

39] In light of the above, the authorities cited and given the nature of the misconduct for which the employee was found guilty, dismissal is the only appropriate sanction. Referring the matter back to a freshly constituted tribunal to impose a sanction would serve no practical purpose in the circumstances.

40] In respect of costs, the first respondent was exercising her right to oppose an application in which the internal appeal chairperson found in her favour. The first respondent was essentially defending her employment and must have reasonably believed that she had some merit and prospects of success in doing so. The first respondent has undoubtedly suffered some hardship, and her dismissal is likely to lead to continued hardship. In the circumstances, it would be just and equitable not to make an order of costs against the first respondent.

In the result, the following order is made:

#### ORDER

1. The decision in respect of sanction of the internal appeal chairperson is reviewed and set aside.
2. The sanction imposed by the internal appeal chairperson is substituted with that of dismissal.
3. No order as to costs.

Daniels, AJ

Acting Judge of the Labour Court of South Africa

Representatives

For the applicant: Adv N Ristic

Instructed by M Van der Walt of Schroter Attorneys

For the Respondent: Mr E Geldenhuys of McGregor Erasmus Inc

[1] Act 66 of 1995 (the LRA).

[2] Weder v MEC for the Department of Health, Western Cape (2013) 34 ILJ 1315 (LC) and Khumalo v Member of the Executive Council for Education: Kwazulu Natal 2014 (5) SA 579 (CC) at para 42.

[3] Weder v MEC for the Department of Health, Western Cape supra at para 8.

[4] 1962

(4) SA 531 (A).

[5] Grootboom v National Prosecuting Authority and another 2013 (5) ZACC 37; (2014) 35 ILJ 121.

[6] Act 56 of 2003.

[7] Using the test in Sidumo & another v Rustenberg Platinum Mines Ltd & others 2008 (2) SA 24 (CC).

[8] (2015) 36 ILJ 163 (LAC).

[9] 2010

(3) SA 201 (SCA); 2009 30 ILJ 2653 (SCA).

[10] Supra at para [37].

[11] The Disciplinary Procedure Collective Agreement Circular No. 01/2018 concluded under the auspices of the South African Local Government

Bargaining Council.

[12] At paragraph 25 of the first respondent's answering affidavit.

[13] Hendricks v Overstrand Municipality & Another (2015) 36 ILJ 163 (LAC) at para 41.

[14] [2000] 3 BLLR 243 (LAC).

[15] At para [10].

[16] At para [12].

[17] De Beers Consolidated Mines v Commission for Conciliation Mediation and Arbitration and Others (JA68/99) [2000] ZALAC 10 (3 March 2000) at para 22.

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