

SOUTH AFRICA / JUDGMENT

Mogaladi and Another v Public Protector South Africa (J 528/21)

[2021] ZALCJHB 64 (28 May 2021)

[2021] ZALCJHB 64

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J 528/21

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 528/21

In the matter between:

PONATSHEGO
MOGALADI
First Applicant
LESEDI
SEKELE
Second Applicant
and
PUBLIC PROTECTOR,
SOUTH AFRICA
Respondent

Heard:

18 May 2021

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 28 May 2021 at 22:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The first and second applicants are senior employees in the employ of the respondent (Office of the Public Protector). They were suspended in October 2019 and subsequently subjected to a disciplinary enquiry on account of various allegations of misconduct related to two specific investigations undertaken by the respondent and the reports issued in that regard.
- [2] The disciplinary enquiry commenced in September 2020 and was finalised on 9 March 2021. The applicants were found guilty on some but not all the charges preferred against them. The parties having made submissions in regards to aggravating and mitigating factors, a ruling on sanction was issued 9 April 2021, with the Chairperson of the disciplinary enquiry having recommended various sanctions against the applicants, including suspensions without pay, coupled with final written warnings.
- [3] It is not apparent as to the reason the applicants were not informed immediately upon the Chairperson having made his ruling. The Public Protector had only done so on 6 May 2021, when attaching a copy of that ruling to a letter addressed to the applicants, and which letter triggered this application. The full text of the letter reads as follows;

‘OUTCOME OF THE DISCIPLINARY PROCEEDINGS

1. The above matter, the findings of the chairperson of the disciplinary proceedings, and the sanctions imposed therein refers.
2. As you are aware, the chairperson delivered his verdict and the reasons thereof on 9 March 2021.
3. In his reasoning, he highlighted the gravity of the misconduct by which you were charged and found guilty. I will not repeat these herein suffice to emphasize the egregious nature and the implications of such findings.
4. The chairperson issued his sanction on 9 April 2021 The sanction, the contents of which are self-explanatory, is attached hereto marked ‘BM1’.
5. Having considered the findings (on evidence) of the Chairperson, and the subsequent sanction imposed I have decided not to implement the sanction imposed by the Chairperson. I am of the strong view that the sanction imposed by the Chairperson is not appropriate apropos the charge, the nature of the misconduct, the guilty verdict, and the breakdown of the relationship of trust between the employer and yourself. Thus, I am hereby imposing a sanction of dismissal with immediate effect, subject to receipt of your representation as stated below.

6. It is apparent from the findings of the chairperson that the trust relationship between the employer and yourself has irretrievably broken down.
7. To this end, I am affording you an opportunity to make representations on why a sanction of a dismissal would not be appropriate under the circumstances.
8. You are requested to provide your representations on or before 18 May 2021.

Best regards,

Advocate Busisiwe Mkhwebane

The Public Protector of South Africa'

- [4] Upon receiving the letter on 7 May 2021, the applicants approached this Court on 14 May 2021 on an urgent basis, seeking an order interdicting the Public Protector from invoking a secondary disciplinary process (to wit a new disciplinary process on sanction) in contravention of the provisions of the applicable Disciplinary Code and Procedure. They also seek an order directing the Public Protector to with immediate effect, implement and comply with the sanction pronounced by the Chairperson issued on 9 April 2021.

Background:

- [5] Given the primary legal points to be determined in this matter, the following brief background is sufficient;

5.1 The first applicant, Ms Ponatshego Mogaladi has been in the employ of the Office of the Public Protector since December 2000. As at November 2018, she had been acting in the position of Executive Manager: Good Governance and Integrity (GGI).

5.2 The second applicant, Ms Lesedi Sekele, joined the Office of Public Protector with effect from April 1999 as a Senior Investigator. In 2013, she had occupied the position of Senior Manager in the Complaints and Stakeholder Management, until April 2018 when was transferred to GGI as Chief Investigator.

5.3 In April 2017, the President of the Economic Freedom Front (EFF) lodged a complaint with the Office of the Public Protector against the Executive Officer of the Financial Sector Conduct Authority (FSCA). Following investigations, the Public Protector had issued and published a report on 26 March 2019. Aggrieved, the FSCA had initiated review proceedings in the North

Gauteng High Court. In a judgment delivered on 9 October 2020, the FSCA report was reviewed and set aside, and declared

constitutionally invalid for lack of jurisdiction. The Public Protector was also ordered to pay the costs of the application.

5.4 Another complaint relevant to these proceedings was lodged by a private citizen, Mr Virgil Rabie in 2011, against Eskom and its agents. Similarly, a report issued in respect of the complaint in question June 2014 was a subject of review proceedings at the North Gauteng High Court. The Office of the Public Protector had not opposed the review application, and in January 2019, the Court had made an order in favour of Rabie, compelling the Public Protector to investigate ‘alleged maladministration of Eskom and its two appointed agents, Ernst Young and Cliffe Dekker Hofmeyr within two months of the date of the order and to file a report within one month’.

5.5 As a consequence of the successful reviews in respect of the two reports, the then Chief Executive Officer in the Office of the Public Protector, Mr Mahlangu, had in October 2019, instituted disciplinary steps against the applicants and another employee (Abongile Madiba), on allegations of misconduct related to the investigations leading to the two reports.

5.6 Formal allegations of misconduct were made against the applicants in November 2019, which were subsequently revised in February 2020. Mogaladi faced six allegations of misconduct, whilst Sekele had to answer to five. The allegations against the applicants are detailed, and range between gross negligence or recklessness, unprofessional conduct, and gross dereliction of duties in relation to the complaints by Rabie and FSCA.

5.7 The disciplinary enquiry commenced in September 2020, and were concluded on 4 March 2021. In his ruling the Chairperson (Adv. W.S Kuboni) had found Mogaladi guilty on four out of six allegations of misconduct, whilst Seleke was found guilty on three out of the five allegations against her.

5.8 On 11 March 2021, the Chairperson of the enquiry had requested the applicants and the Public Protector to make submissions in regard to mitigating and aggravating factor before a sanction could be considered. As already indicated, the Chairperson recommended a sanction of suspension without pay together with a final written warning for six months against Mogaladi, and a suspension of two months without pay together with a final written warning of two months against Seleke.

Evaluation:

[6] The Public Protector’s response to the ruling on sanction had triggered this application. The application is opposed on three main grounds, viz., that the applicants have not demonstrated urgency; that the application was premature; and in regards to the merits, that the

applicants have failed to satisfy the requirements of the relief they seek.

[7] The applicants seek final relief. This requires of them to satisfy three essential requirements, being: (a) the existence of a clear right;

(b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy[1].

- [8] In regards to the issue of a clear right, the onus is on the applicants to prove the right sought to be protected on a balance of

probability. It has been held that an applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish the right to urgent relief than an applicant who comes to court for interim relief[2].

- [9] To the extent that the crisp issue in this case is whether the Public Protector could lawfully alter or consider altering the Chairperson's sanction, once it is established that she cannot, this would then be make her conduct unlawful, and thus the applicants would have demonstrated a clear right to the relief that they seek.

Urgency:

- [10] The principles applicable to urgent applications need no introduction, other than to reiterate that some matters are inherently urgent, whilst others become urgent due to their particular circumstances. The Court nonetheless enjoys a discretion in according a matter urgency. In the exercise of its discretion, the Court will examine whether the applicant has in the founding papers, set out the circumstances which justifies that the application be heard as one of urgency, and the basis upon which it is said that substantial redress would not be obtained at a hearing in due course. Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case[3]. Of equal importance is that urgent relief will be denied where it is self-created, as the primary objective of approaching a Court on an urgent basis is to prevent harm or prejudice from occurring[4].
- [11] The letter from the Public Protector requiring the applicants to make submissions as to the reason why the sanction should not be changed was issued on 7 May 2021. The applicants were required to respond by 18 May 2021. The applicants had approached this Court on 14 May 2021. In my view, it cannot be said that the delay in bringing the application is so excessive as to conclude that they did not approach the Court with the necessary haste.
- [12] I agree that the Public Protector may have been prejudiced by the time frames set by the applicants in approaching the Court. In my view however, and given the conduct complained of, the applicants were indeed entitled to approach the Court in the manner that they did, and nothing prevented the Public Protector from seeking more time from the Court in the event that the time periods had prevented her from formulating a proper defence to the applicants' case. In any event, a substantive answering affidavit was duly filed and served, coupled with succinct heads of arguments, which were of considerable assistance to the Court. I therefore do not appreciate given the nature of urgent proceedings, how the Public Protector was disadvantaged to the extent that it can be said that she was not afforded an opportunity to fully met the applicants' case.

- [13] The Public Protector further contended that the applicants have not alleged any imminent danger to justify the urgency. It was submitted that all that was required of the applicants was to make representations as requested, in order to convince the Public Protector not to alter the sanction, rather than approaching this Court on an urgent basis. To the extent that they may be unsuccessful, it was submitted that they then available remedies available to persons who are subjected to an unlawful or unfair dismissal.
- [14] The applicants contend that the application is urgent on the basis that they are being hampered from practicing and enjoying the right to practice their occupation as guaranteed under section 22 of the Constitution;[5] that their right to fair labour practices was being violated and was to be severely sullied by the Public Protector, and that to the extent that they sought to enforce their constitutional rights, the matter ought to be treated as urgent. They further contend that they have already suffered prejudice by being subjected to an unfair and contemporaneously inconsistent disciplinary hearing preferred against them, and that they were likely to suffer severe prejudice by being subjected to an illegal secondary disciplinary hearing in contravention of the Code applicable to employees in the Office of the Public Protector.
- [15] There is no doubt that the question of urgency is intrinsically linked to the alternative remedy available. The applicants may, in the event that they were to bring an application based on the same grounds, obtain substantial redress. However, given the fundamental principles in urgent applications being to prevent harm or prejudice from occurring, and to the extent that the applicants seeks to exactly do so, it may be found that they have demonstrated a right to the relief they seek, and the redress in due course may not be substantial. Given what has been postulated in the respective affidavits, it is my view that the facts of this case are not as simple as made out to be on behalf of the Public Protector, and requires of this Court to exercise its discretion in the applicants' favour. There is no doubt that this matter is indeed is of significance importance, as it concerns questions surrounding the powers of the Public Protector in relation to employees in her office, and more particularly in reference to the

authorities to be dealt with in this judgment. There is therefore no basis for any conclusion to be reached that the urgency claimed is self-created. The matter will therefore be dealt with as urgent.

The merits:

- [16] Central to the determination of the merits of this application is the issue of whether or not the Public Protector is entitled to deviate from the Chairperson's recommendations. This Court and the higher courts have over the years grappled with the question whether it is permissible for an employer to alter the findings and sanction imposed by a chairperson of a properly constituted disciplinary enquiry.

- [17] The matter before the Court is in many respects unusual. This is so in that in most of the cases dealt with previously by this Court, and the higher courts, it is either it is the employer (specifically the State as an employer) that has approached the Court by way of review proceedings under the provisions of section 158(1)(h) of the Labour Relations Act (LRA)[6] to seek that a lesser sanction imposed on an employee be altered to a more severe one. In some instances, it would be where an employee is already dismissed subsequent to a secondary hearing, or had been subjected to a harsher sanction than that initially imposed. In the latter instances, the concerned employee would have had referred the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) or bargaining council, resulting with the matter being before this Court by way of review proceedings, or before the higher courts by way of appeal proceedings. One of the rare cases where the issue in question came directly to this Court by way of urgent proceedings is *Tshivhandekano v Minister of Mineral Resources and Others*[7], which I will deal at a later stage.
- [18] Prior to dealing with the principles to be extrapolated from these authorities and as shall be applied to the facts of this case, it is apposite to swiftly deal with the obvious. Under Chapter 9 and section 181 of the Constitution of the Republic, the Public Protector is established as an independent institution and subject only to the Constitution and the law. It however remains an integral part of the governance system in South Africa. Its primary objective is to inter alia strengthen constitutional democracy.
- [19] In *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*, [8] it was confirmed that the Office of the Public Protector is not a department of state and that it is functionally separate from the state administration. It was however held that it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature.
- [20] In determining whether the Public Protector is entitled to unilaterally alter a disciplinary sanction she is aggrieved with, the starting point would be to examine the mandate of the Chairpersons of disciplinary enquiries as contained in the 'Public Protector's Disciplinary Code and Procedure'[9], and the Public Protector's role and powers in disciplinary matters affecting her office. The principles that underpin the Code and the clauses pertinent to this case are that;
- 20.1 The Constitution, the Public Protector Act[10] and the LRA form the legislative framework of the Code.
- 20.2 The Employer for all intents and purposes means the Public Protector of South Africa, whilst the Executive Authority refers to the Public Protector;
- 20.3 Under clause 9.3 (b) of the Code, chairpersons of the disciplinary hearings are appointed by the employer, and the Public Protector may decide to appoint external Chairperson.
- 20.4 Clause 9.4 (a) (Sanction) of the Code, provides that;

“The Chairperson shall submit a report containing the final sanction of the disciplinary hearing to the Chief Executive Officer in respect of employees on level 1 – 12 and to the Public Protector in respect of employees on Senior Management Services (13 – 16) for implementation”.

20.5 Clause 10.8 provides that;

‘Senior Managers do not have the right to appeal in both informal and formal discipline but they may refer a dispute to applicable legislative institution within the prescribed time for conciliation followed by the arbitration process should conciliation have failed, alternatively refer the dispute for the con/arb process’

[21] Equally contentious and pertinent to the determination of the application is the Chairperson’s ‘Decision on Sanction’[11], which reads;

‘26. In the circumstances, I recommend the following sanctions, for implementation:

26.1 in respect of Mogaladi I recommend that she be suspended without pay for a period of three months coupled with a Final Written Warning for six months and such final warning to commence after the expiry of the suspension;

26.2 In respect of Seleke, I recommend a suspension of two months without pay together with a Final Written Warning of six months and such final written warning to commence after the expiry of the suspension’

[22] Most of the authorities referred to in this judgment received similar attention in the parties’ respective heads of argument and oral submissions, and the Court is indebted to both counsel. Applying the principles to be extrapolated from these authorities, the following conclusions ought to be made;

22.1 On a general level, it is correct that an employer has a right to subject an employee to a second disciplinary inquiry 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[12].

22.2 Exceptional circumstances is not however the only yardstick, as fairness dictates that the interests of the employee and the employer must be brought into account. The employer is entitled to revisit the offence by means of a second disciplinary hearing, as it would be manifestly unfair for the employer to be saddled with a quick, ill-informal and incorrect decision of its employers who misconceived the seriousness of the matter and took an inappropriate decision leading to an inappropriate penalty[13].

22.3 The conduct of disciplinary hearings in the workplace where the employer is the State constitutes administrative action, which is required to be lawful, reasonable and procedurally fair. However if it can be shown that the conduct or decision was not reasonable, that action can be reviewed and set aside[14].

22.4 The decision of the chairperson of the hearing, acting qua state employer, qualifies as administrative action and that the chairperson's decision could be reviewed on such grounds as are permissible in law which would make the decision reviewable under section 158 (1)(h) of the LRA. In such circumstances, the state as an employer was not only entitled, but bound to take the chairperson's decision on review, and that it could competently do so in terms of section 158(1)(h) of the LRA which makes clear provision for such a review on such grounds as are permissible in law[15]. This is so in that this Court has the power under section 158(1)(h) of the LRA 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"[16].

22.5 Where the authority to alter a sanction does not derive from the wording of a collective agreement (or from any discernible and lawful source), an employer cannot exercise such rights, as to do so would be ultra vires the disciplinary code and the collective agreement, which had statutory authority in terms of the LRA. The employer in such circumstances is entitled to bring a review application and set aside the sanction imposed the chairperson of a disciplinary enquiry[17].

22.6 A person appointed to perform the function of a chairperson is clothed with the persona of the employer, and his/her decision is that of the employer. Furthermore, where the employer was an organ of state, it could not unilaterally repudiate its own decision, and any substitution of a sanction would be invalid, which invalidity vitiates the act completely[18].

22.7 As already indicated, there are similarities between the facts of this case and those in *Tshivhandekano v Minister of Mineral Resources and Others*,[19] in that the employee had also in that case, approached this Court on an urgent basis to seek a declaratory order that his dismissal was unlawful and void ab initio. This was in circumstances where the employee had immediately approached the Court, upon the Director – General having altered his final written warning into a dismissal. The Court (per La Grange J), had held that even though the State as employer had the right to review its own decisions, this did not equate to a right to simply take the matter into its own hands and reverse a decision

already taken, as any subsequent sanction of dismissal would have been a fundamental breach of the applicant's clear contractual

right to a disciplinary hearing in terms of his contract of employment, making that decision to dismiss both ultra vires and in breach of his contract of employment[20].

[23] The applicants in this case relied on the Labour Appeal Court's (LAC) decision in *Chatrooghoon*[21] and the subsequent Constitutional Court decision in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (Kruger 2)*[22], for the proposition that the employer was bound by the sanctions of the Chairperson.

[24] It was however submitted on behalf of the Public Protector that reliance on these authorities was misplaced on a variety of reasons including that they are distinguishable in that the applicants in this case were not relying on a collective agreement which precluded the altering of the sanction; that the chairpersons in those cases had not made recommendations as in this case; that no reasons were advanced in those cases by the employer as to why it was fair to revisit the sanctions of the chairperson. It was further submitted that in the cases relied upon, the employees were dismissed after exercising their rights to make representations; and that the disputes were initially referred to the CCMA and thereafter to this Court for review.

[25] It is correct in this case that the applicant cannot lay claim to any collective agreement in respect of the applicable Code. Several difficulties however arise from the submissions made on behalf of the Public Protector in the light of the authorities referred to above for the following reasons;

25.1 Even though it is correct that the Public Protector is entitled to be aggrieved with the findings of the chairperson and to seek to alter them, it is more the lawfulness of the approach that she seeks to follow to have the sanction altered, that is subject to scrutiny.

25.2 Inasmuch as it was submitted on behalf of the Public Protector that the Code does not prohibit a review or reconsideration of the sanction, in similar fashion, there is nothing in the Code that entitles her to on her own, do so, even if exceptional circumstances existed, or it was fair to do so.

25.3 The proposition that the Public Protector is entitled to merely revisit the sanction by affording the applicants an opportunity to make representations as to why they should not be dismissed in my view misses the point, and more specifically loses sight of the caution drawn by the authorities referred to, in regards to what may loosely be referred to as 'self-help'. First, that approach of affording the applicants an opportunity to make representations is not sanctioned by the Code, and irrespective of how benevolent and fair she might view that approach to be, the fact remains that she has no inherent authority or source to request the applicants to make representations in view of the completed disciplinary proceedings.

25.4 A further consideration is that by the Public Protector appointing the Chairperson of the disciplinary enquiry in accordance with the provisions of clause 9.3 (b) of the Code, the latter had made his findings and sanction clothed with the persona of the employer, and his decision therefore remained that of the Office of the Public Protector as the employer. It is therefore not for the Public Protector as Executive Authority to take upon herself to seek to alter the sanction simply because she does not agree with it.

25.5 Whether there are exceptional circumstances or whether it is fair to alter the sanction is entirely not within the sole preserve of the Public Protector. To hold otherwise would clearly countenance self-help, which would be inimical to the rule of law and more particularly, the provisions of section 34 of the Constitution. These provisions embodies a fundamental rule of natural justice, according to which everyone has the right to have a dispute settled by a court of law or an unbiased, independent and impartial tribunal, where appropriate; and nobody should be allowed to take the law into his or her own hands or to usurp the functions of a court of law[23]. In similar fashion, the Public Protector cannot be entitled to effectively usurp for herself, the rights and powers she had duly

delegated to the Chairperson in accordance with the applicable Code.

25.6 The proposition that the Chairperson of the enquiry had merely made recommendations which it was for the Public Protector to implement or not, equally is not supported by a proper reading of the clause 9.4 (a) of the Code. These provisions required the Chairperson to submit a report containing the final sanction of the disciplinary hearing to the Public Protector for implementation.

25.7 The mere fact that the Chairperson had in his findings made reference to recommend does not detract from the fact that the Code, which is binding on the Public Protector, specifically required the Chairperson to determine a final sanction. Had the Code specifically merely required recommendations from the Chairperson, this would have been stated therein in clear terms.

25.8 Furthermore, the question of non-joinder of the Chairperson to the extent that he had made reference to 'recommend', is not in my view fatal, as it is more the substance of his findings that the applicants seek to hold the Public Protector to, rather than its form.

25.9 Equally so, it is apparent that the Chairperson in determining the final sanction, must have been alive to the provisions of clause 10.8 of the Code, which specifically provide that the applicants as senior managers do not have the right to appeal in both informal and formal discipline. A further reading of that clause indicates that the only way that the applicants can challenge any initial or subsequent adverse sanction arising from an internal disciplinary process, is by way of applicable legislative institution, meaning a referral of a dispute as contemplated in the provisions of the LRA.

25.10 Thus, to the extent that the applicants do not enjoy a right of an internal appeal, it follows that the Public Protector as required of her, was to implement the final sanction imposed by the Chairperson as stipulated in the Code. Contrary to the contentions made on behalf of the Public Protector, it cannot be read in that provision that subsequent to the applicants having made their representations, and to the extent that they may be dismissed, they would have a right of an internal appeal. Clearly they do not.

25.11 In the light of the facts of this case and the authorities referred to, it should be concluded that to the extent that the Public Protector is a creature of the Constitution and subject to the law, and further to the extent that it is an organ of state because of constitutional powers and other statutory powers it exercises, it follows that it is bound by the sanctions imposed by the Chairperson. Further to the extent that the applicable Code does not authorise the Public Protector to alter a sanction imposed by the Chairperson, she cannot exercise such rights, as to do so would be ultra vires the Code which is binding on her.

25.12 As already indicated, most if not all of the cases relied upon by the Public Protector in defending her stance, came before the Courts directly via the provisions of section 158(1)(h) of the LRA route, or where those matters had been through arbitration proceedings upon an adverse sanction having subsequently been imposed. Given the constitutional status of the Public Protector, it follows that she cannot unilaterally repudiate decisions made on its behalf as an employer, unless of course she sought a review of those decision in line with the authorities referred to elsewhere in this judgment. She cannot therefore resort to self-help, which intention can clearly be gleaned from the tone of her letter of 6 May 2021 addressed to the applicants.

25.13 The applicants' concerns that the Public Protector has already decided their fate are not misplaced. The Public Protector specifically stated in her letter that she is 'hereby imposing a sanction of dismissal with immediate effect, subject to receipt of your representation'. It was submitted on behalf of the Public Protector that the Court must accept the bona fides of the contents of the letter. The Court will however be hard-pressed to do so based purely on a plain reading of that letter.

25.14 Even if it were to be assumed that the Public Protector was entitled to alter the sanction and request the applicants to make representations, the circumstances would have been slightly different, had the Public Protector afforded them an opportunity to make a representation as to why a different sanction other than or including a dismissal ought to be imposed. Instead, they are informed that they are dismissed with immediate effect, and are thereafter called upon to show cause why they should not be dismissed. The irony is clearly self-evident, and the applicants' scepticism of the Public Protector's bona fides is not misplaced.

25.15 The submission made on behalf of the Public Protector that following representations by the applicants as requested, it may be so that their sanctions are even reduced. This proposition is indeed far-fetched, and is clearly not supported by the content of her letter and its tone. Clearly in these circumstances the applicants are entitled to approach the Court to seek relief protecting their rights, primary of which is not to be subjected to an unlawful conduct on the part of the Public Protector.

[26] In summary, this matter deserved the urgent attention of this Court. To the extent that it has been found that the Public Protector cannot lawfully alter or consider altering the Chairperson's sanction, the applicants have demonstrated a clear right to the relief that they seek, and it would not be necessary to consider whether other requirements for final relief have been met, or whether the applicant's application is premature.

[27] I have had regard to the provisions of section 162 of the LRA in regards to an award of costs. It is my view that even though it has been found that the Public Protector has no basis to embark on the path she chose in seeking to alter the sanction imposed by the Chairperson, it cannot be said that the opposition to this application was mala fide or meritless. In the circumstances, the requirements of law and fairness dictate that each party be burdened with its own costs.

[28] Accordingly, the following order is made;

Order:

1. The non-compliance with the forms and service contemplated in the Rules of this Court is condoned and this matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court.
2. The Respondent is interdicted from invoking a secondary disciplinary process as intended with from her correspondence to the First and Second Applicants dated 6 May 2021.
3. The Respondent is ordered to with immediate effect, implement and comply with the final sanction imposed by the Chairperson of the Disciplinary hearing, Adv S Khuboni, dated 8 April 2021.
4. Each party is to pay their own costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the 1st and 2nd Applicants: M.H.M. Masilo, instructed by Tshiqi Zebediela Attorneys

For the Respondent: D. Mpofu SC with Adv. K Pillay, instructed by Chaane Attorneys

[1] Setlogelo v Setlogelo 1914 AD 221 at 227; V & A Waterfront Properties (Pty) Ltd & another v Helicopter & Marine Services (Pty) Ltd & others 2006

(1) SA 252 (SCA) at para 20

[2] Tshwaedi v Greater Louis Trichardt Transitional Council [2000] 4 BLLR 469 (LC) at para 11

[3] See East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others

(2012) JOL 28244 (GSJ) at para 6 and 7; See also Export Development Canada and Another v Westdawn Investments Proprietary and Others (6151/2018)

[2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others

(2014) JOL 32103 (GP) at para 63 – 64, where it was held; “It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded

substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent’s and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.”

[3] See East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others

(2012) JOL 28244 (GSJ) at para 6 and 7; See also Export Development Canada and Another v Westdawn Investments Proprietary and Others (6151/2018)

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substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

[4] See *Golding v HCI Managerial Services (Pty) Ltd and others*

[2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11; *Luna Meubel Vervardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137A-E.)

[5] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

[6] Act 66 of 1995, as amended

[7] [2018] ZALCJHB 70; [2018] 6 BLLR 628 (LC); (2018) 39 ILJ 1847 (LC) (2 March 2018)

[8] 308/2017)

[2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) at para 37, where it was held; "First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. Secondly, it is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, although the State Liability Act 20 of 1957 applies to the Office of the Public Protector to enable it to sue and be sued, it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action. That being so, the PAJA does not apply to the review of exercises of power by the Public Protector in terms of s 182 of the Constitution and s6 of the Public Protector Act. That means that the principle of legality applies to the review of the decisions in issue in this case."

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- [9] Annexure ‘PM8’ to the consolidated index (Pages 205 – 224). The Code is dated 1 April 2019, and is signed by Adv Busisiwe Mkhwebane
- [10] Act 23 of 1994
- [11] Annexure ‘PM5’ (page 180 of the consolidated bundle)
- [12] See also *Samson v Commission for Conciliation, Mediation and Arbitration and Others* (D460/08)
- [2009] ZALC 64; (2010) 31 ILJ 170 (LC); [2009] 11 BLLR 1119 (LC) at para 12
- [13] *Branford v Metrorail Services (Durban) and Others* (DA19/2002) [2003] ZALAC 16 (13 November 2003) At para 15
- [14] MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another (DA16/05) [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC) (21 December 2007) At paras 10 and 14
- [15] *Ntshangase v MEC for Finance: Kwazulu-Natal & Another* 2010(3) SA 201 (SCA); (2009) 30 ILJ 2653 (SCA) at para 14
- [16] *Hendricks v Overstrand Municipality and Another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC)
- [17] *SARS v CCMA & Others* (“Chatrooghoon”) (DA 7/11) [2013] ZALAC 26; [2014] 1 BLLR 44 (LAC); (2014) 35 ILJ 656 (LAC) At para 28, where it was held; “The wording of the collective agreement does not only make it abundantly clear that the chairperson’s pronouncement on penalty is the final sanction...it also leaves no room for interpretation in favour of the parties having intended to provide in the collective agreement a term granting a right to SARS to substitute its own sanction for a sanction imposed by its chairperson. Whilst it is trite that the duty of trust and confidence on the part of an employee is a term implied by law in an employment contract, I do not think that such implied term extends to include, the right of

an employer to substitute its own sanction for that of the chairperson, particularly...where the parties in a collective agreement elected expressly to confer on the disciplinary chairperson the sole power to impose the final sanction” See also at paras 10 - 11

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- [18] SARS v Commission for Conciliation, Mediation & Arbitration & others (Kruger 1)

- (2016) 37 ILJ 655 (LAC) at paras 41- 42, where the Court held’ “[41] In my view, the proper starting point for an understanding of the critical controversy is the jurisprudential character of the disciplinary enquiry chair’s decision. It is plain that the person appointed to perform that function is clothed with the

persona of the employer. The chair’s decision is that of the employer. Anomalously, an employer that is an organ of state may review itself, an escape mechanism not available to employers in the private sector. But plainly, an employer that is an organ of state cannot unilaterally repudiate its own decision. So much is beyond doubt as a result of the judgments in Oudekraal Estates v City of Cape Town 2004 (6) SA 222 (SCA) at paragraphs 35 – 37, Benwenyama Minerals (Pty) Ltd Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) at paragraph 85, and Ntshangase (Supra).

- [42] Thus, in my view, it must follow that if the substitution of a sanction is invalid, as found in Chatrooghoon, that invalidity vitiates the act completely; i.e. it cannot be made. Invalidity is more than procedural unfairness, it denotes an unlawful act; i.e. one the law will not acknowledge. Accordingly, in my view Pillay J was correct to hold that an invalid substitution of a sanction was not merely an instance of procedural unfairness that might leave open a space for a parallel enquiry into the appropriateness of a remedy for such a “procedural” mishap and, in turn, allow space to address the gravamen of the misconduct per se. Similarly, the contention that the judgment of Ndlovu JA, in Chatrooghoon, has application only to procedural unfairness cannot succeed because the force of those dicta by Ndlovu JA is that a substitution of a sanction without a lawful foundation, is not merely unfair for want of a procedural authorisation, but is invalid.”

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[19] Supra

[20] *Tshivhandekano v Minister of Mineral Resources and Others* At paras 13 - 14

[21] Supra

[22] [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC)

[23] See *Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 at para 5

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