



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION: JOHANNESBURG)**

CASE NO: 2019/12874

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED. NO


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SIGNATURE

DATE: 23 November 2021

In the matter between:

THINA BAMBENI

APPLICANT

and

DEMOCRATIC ALLIANCE

RESPONDENT

JUDGMENT

MANOIM J

- [1] On 24 July 2018, a Democratic Alliance (DA) city councillor in the Ekurhuleni Metropolitan Municipality, put up her hand to speak at a meeting of her party's council caucus. The agenda item then being discussed was known as the congratulations and condolences segment. But the councillor who rose spoke to neither of these topics. Instead to the surprise of all present she used the occasion to say that the chairperson of the caucus had on four prior occasions sexually harassed her.
- [2] That address and how the party dealt with its consequences are the subject matter of the relief sought in the matter. The applicant is the member who put up her hand to speak on that day. The party, some of whose members heard her on that day, is the respondent.
- [3] She alleges that her complaint was not properly dealt with and ultimately dismissed. Instead, it led to her as the complainant becoming the victim, as she faced subsequent disciplinary action to remove her from the caucus. The disciplinary process against her has yet to be concluded, as I explain later.
- [4] The story of subsequent events is much lengthier than that and has led to several internal party enquiries, magistrate court proceedings brought by the applicant against five DA councillors for protection orders, two urgent applications in this court to suspend the disciplinary enquiries against her and two others related to the magistrate court protection order processes.
- [5] The present proceedings however are confined to determining the relief the applicant now seeks against the party. Although the original relief claimed in her notice of motion was much more extensive the applicant now limits her claims to the following five points of relief:
- a. *"The decision taken by the Respondent to suspend the Applicant is reviewed and set aside."*

- b. The suspension of the Applicant be uplifted thereby restoring the status quo ante, prior to suspension.*
- c. The Respondent be interdicted and restrained from victimising the Applicant with the disciplinary actions it instituted in the past as a consequence of the Applicant lodging a complaint of sexual harassment, and any further disciplinary action and/or forms of victimisation or retaliation the Respondent might wish to invoke against the Applicant.*
- d. That the Applicant's membership or participation in the "DA Official Contents 9" WhatsApp group that was removed by Mr Ashor Sarupen MPL on Friday, 12 February 2021 restoring the Applicant's status quo ante. (Sic)*
- e. That leaders of the relevant structures of the Respondent where the Applicant's sexual harassment complaint was discussed issue unreserved apologies in writing to the Applicant, as well as in the presence of the Applicant in attendance at the meeting of each such structure of the Respondent.*

Background

- [6] The papers in this matter are lengthy and include two urgent applications. Despite their length there is much repetition. The salient points relevant to this application can be set out briefly and I do not need to go into them in any great detail, given the legal conclusions I have reached in this matter, as I explain in the next section.
- [7] The applicant, who appears for herself, and the respondent have usefully agreed upon a common cause chronology of the events, and it is to this I now turn in sketching the background facts.
- [8] The applicant alleges that on four separate occasions between 19 November 2016 and 15 September 2017, Shadow Shabangu a DA councillor and the caucus chair sexually harassed her. The harassment comprised of remarks made to her which on some of these occasions had been made in the presence of others. On three of these occasions Shabangu is alleged to have made known his feelings towards her in what she regarded as a sexually predatory manner. On the fourth and most recent occasion at a conference of the party, he had in within earshot of others, shouted out to her to give him her room number.

- [9] The applicant lodged a complaint in writing against Shabangu with senior members of the DA on the same day she rose to speak at the caucus meeting, 24 July 2018.
- [10] Two days later what is called the first disciplinary committee convened and interviewed both the applicant and Shabangu concerning the complaint. The panel recommended mediation but both the applicant and Shabangu rejected this proposal.
- [11] On 22nd and 24th August a second panel was convened to investigate the complaint. This panel embarked on interviews with all the witnesses who the applicant had alleged would have overheard Shabangu's remarks. According to the respondent none of these witnesses confirmed the applicant's version.
- [12] In relation to the fourth incident, Shabangu admitted making remarks about the room numbers, but he said his remarks were not shouted out and were made as friendly banter with the applicant and other female delegates present. The second panel came to the conclusion that there was no evidence for the applicant's complaint.
- [13] A third panel was then convened to report back the outcome of the second panel's investigation to the applicant. This panel recommended that the applicant be given a chance to draft a second affidavit and that mediation be attempted again.
- [14] The second panel however disagreed with this proposal. It did not consider there was any need for a second affidavit. Instead, they proposed the matter be sent to the DA's Federal Legal Commission (FLC).
- [15] Prior to the FLC taking further steps a second track started. On 6 February 2019, the applicant was informed that she must appear before a disciplinary committee to face a charge of laying a false complaint. A month later on 20 March 2019 she received a notice telling her she had been suspended from caucus activities.
- [16] On 1 April, the DA caucus met to consider her suspension. Prior to this she had been asked to make representations and then further representations. She acceded to the first invitation but not the second. She then asked to make oral representations to the caucus, but this was refused.
- [17] At the caucus meeting her representations were shown on an overhead projector; a vote followed after discussion. The caucus voted 51 – 9 to suspend her, with 8 abstentions. This then triggered her suspension.

- [18] In the meantime, four days later, the first track (her complaint against Shabangu) resumed. The FLC convened on 5 April 2019 and interviewed various witnesses. The applicant declined to be interviewed.
- [19] On 23 April, the FLC concluded that there was no basis to her complaint against Shabangu.
- [20] Meanwhile a third track had started just before the FLC finding was made known. The applicant had on 8 April 2019 filed her first notice of motion for review.
- [21] Over the next few months, the parties were engaged in litigation. It involved a second, and then third notice of motion in the review, an application for the record in terms of Rule 53, and in August 2019, an urgent application. The latter application, which served before Yacoob J, in which the applicant succeeded, interdicted the further disciplinary proceedings against her pending the outcome of the present review. A second application of a similar nature was obtained in October 2019 from Van der Linde J on 21 October 2019. The final event of relevance to the relief sought came about on 12 February 2021 when the applicant was removed as a member of a WhatsApp group bearing the name “DA official contents 9”. This group is an information sharing platform to enable the leadership of the party to disseminate information to its public representatives who can then in turn disseminate the information to the branches they are responsible for.

Comment on the background facts

- [22] The applicant maintains her complaint into Shabangu’s conduct was managed insensitively and without due regard to her feelings. She considers the party did not approach the issue in the manner in which our courts have said they should.¹ The

¹ See for instance *McGregor v Public Health and Social Development Sectoral Bargaining Council and others* [2021] ZACC 14 and 2021 (5) SA 425 (CC) where Khampepe J stated at paragraphs 42-3 “Yet sexual harassment strips away at the core of a person’s dignity and is the antithesis of substantive equality in the workplace. It also promotes a culture of gender-based violence that dictates the lived experiences of women and men within public and private spaces and across personal and professional latitudes. Furthermore, we know that ‘(a)t its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace’. Indeed, between Dr McGregor and his victim crouched an indisputable power imbalance that has to be understood as underpinning this entire matter. Dr McGregor was 30 years the victim’s senior and in a position of authority. Not only does the power imbalance tip according to the professional positions, but it topples in terms of gender at the intersection of age.”

party approached the matter as one of establishing whether there was objective external evidence and finding none, considered the complaint was false. She objects to the fact that the party then turned her from a complainant into an accused. This as the chronology shows came about even before her complaint had finally been decided upon by the FLC. The party, in her view, was tone deaf about sexual harassment considering that Shabangu was both an older man and senior to her in the party which should have placed a different context on his remarks.

- [23] The respondent maintains that the applicant was the author of her own misfortune, both by exaggerating the facts and how she handled the matter. It is not necessary for me to go into which gloss on the factual history is correct. Neither view is relevant at present to what I have to decide.

Legal basis for review

- [24] In her founding affidavit the applicant had founded her relief on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). She has now clarified that she does not do so, and the review part of her relief is based on the common law.
- [25] This limits her review in several ways. In the first place an applicant seeking to rely on the common law to review decisions made by a voluntary association such as the respondent needs to make out a case in contract. In brief she needs to make out a case that the respondent has by instituting disciplinary action not done so in accordance with its constitution.
- [26] Thus, in the leading case on the subject *Turner v Jockey Club of South Africa* the court held that the decisions of disciplinary tribunals of voluntary associations are final: *“but if the Tribunal has disregarded its own rules or the fundamental principles of fairness the court can intervene.”*²
- [27] On this aspect the applicant has not made out any case. She has not pointed to any provision in respondent’s constitution that was not complied with. The respondent in turn has established that it has complied with its constitution by quoting the various provisions that would entitle it to make the charges it has and the process it has followed in doing so.

² 1974(3)SA 633(A).

[28] At best following the *Turner* case the applicant may have a case in relation to fairness, in respect of the roll of Mr Mervyn Cirola who is the party official responsible for the appointment of disciplinary panels. According to the applicant Mr. Cirola was the attorney who represented Shabangu in her complaint seeking a protection order in the magistrates court. She describes Cirola as Shabangu's attorney

[29] Cirola minimizes his role saying he appeared for Shabangu as the hearing was at short notice, but he is otherwise not his attorney. Whether this deals with her concerns, is open to some doubt, but this aspect does not need to be decided at this point. This is because Cirola says he has had no role in the choice of disciplinary panels. Applying the rule in *Plascon Evans*³ his version on this aspect must be accepted. Thus far then there is no basis to say that applying a fairness standard the roll of Cirola as being open to suggestion of bias has infected the process against the applicant.

[30] Although the applicant has now been placed on cautionary suspension she has not been removed as councillor and still is paid as a councillor. She was not paid by the DA, so the suspension has not had a financial impact on her.

[31] In the *Magashule* case the court noted that there is a difference in consequence between precautionary suspensions and punitive suspensions. This affects the requirement for *audi*. As the court put it after considering certain labour law cases:
*The above approach deals largely with the operation of the principle of natural justice in the setting of disciplinary proceedings, as opposed to a decision to suspend as contemplated in rule 25.70. For the reasons we have already given, a decision to suspend is not a disciplinary proceeding and therefore does not automatically attract the operation of the principles of natural justice.*⁴

[32] Despite this applying in an employment context the court in *Magashule* noted further that:

*"While Long deals with precautionary suspensions in an employment context, precautionary suspensions within a political party were dealt with on a similar basis in Lewis v Heffer and others."*⁵

³ 1984(3) SA 623(A) at 634.

⁴ *Magashule v Ramaphosa and Others* (2021/23795) [2021] ZAGPJHC 88; [2021] 3 All SA 887 (GJ) (9 July 2021) Paragraph 111.

⁵ *Ibid*, paragraph 113,

Conclusion

[33] In summary the applicant has not made a basis at this stage for the first ground of her relief that the disciplinary proceedings be reviewed. These proceedings have not been finalised and such relief is premature. Nor does the fact that she was suspended pending the outcome of the enquiry change that matter. The law is clear that unless the suspension was punitive the party does not need to comply with the principles of natural justice. Her suspension was not punitive as she remains a councillor and receives her full remuneration.

[34] This means that regardless of her contentions about the role of Mr. Cirotta (which in any event have been denied) this point too has been made prematurely. The applicant has not made out a basis for review of the pending disciplinary enquiry at this stage.

[35] I now turn to the remaining relief sought.

[36] The same conclusion applies to the remainder of her relief. It is premature to conclude that she is being victimised in terms of this disciplinary enquiry nor is there any legal basis to interdict the respondent from disciplining her in future enquiries.

[37] Her removal from the WhatsApp group is consequent on the suspension and for reasons stated above it, like the enquiry, is not reviewable at this stage.

[38] Finally, a requirement for the relevant party members to be ordered to apologise is deficient in several respects; it is premature, the party members are not identified and have not been joined.

[39] For these reasons, the application must be dismissed. In the interests of certainty, I have also clarified that the interim relief has been discharged.

Costs

[40] The applicant must pay the costs of this application as she has been unsuccessful.

ORDER

I make the following order:

1. The application brought by the applicant under the above case number and comprising her notice of motion dated 8 April 2019, her supplementary notice of motion dated 7 May

2019, and her second supplementary notice of motion dated 26 February 2021 (together the review application), is dismissed.:

2. The interim interdicts granted by Yacoob J on 21 August 2019, and by Van der Linde J on 21 October, both under the above case number, are both discharged.

3. The applicant shall pay the cost of the respondent in opposing the application on a party and party basis.



N MANOIM

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 23 November 2021.

Date of hearing: 11 October 2021

Date of judgment: 23 November

Appearances:

Counsel for the applicant: Applicant appeared in person

Attorney for the applicant: Bambeni Attorneys

Counsel for the respondent: Advocate P Olivier.

Attorneys for the respondent: Minde Shapiro and Smith.