IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 72/20

In the matter between:

MINISTER OF WOMEN **Applicant**

and

MR DERICK MAHAPA **First Respondent**

MR M SHABANGU **Second Respondent**

Heard: **01 December 2023**

Delivered: **16 January 2024**

Summary: **Practice and procedure – section 158(1)(h) of the LRA – Minister impugns the decision of the presiding officer of the disciplinary hearing – legality review with implicates a constitutional obligation of the State as the employer – No LRA vehicle available to the State to review its own decisions – Labour Court Practice Manual finds no application – Rule of 53 of Uniform Rules is a correct procedure – review not deemed withdrawn or archived.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant (the Minister) brought an application in terms of section 158(1)(h) of the Labour Relations Act[1] (LRA) to review and set aside the decision of the second respondent (Mr Khoza) (main application). Mr Khoza was appointed as the presiding officer over the disciplinary enquiry against the first respondent (Mr Mahapa). Mr Mahapa faced six charges of gross misconduct that pertained to alleged procurement irregularities. He was exonerated from three charges and found guilty of the other three. Despite having found Mr Mahapa guilty of charges that relate to misrepresentation, Mr Khoza recommended a sanction of a final written warning. The Minister impugns the reasonableness of Mr Khoza's findings and the sanction of a final written warning.

[2] What serves before me is the interlocutory application for the reinstatement of the main application which, according to Mr Mahapa, is deemed withdrawn and/or archived in terms of clause 11.2.3 read with clause 11.2.7 and 16 of the Labour Court's Practice Manual[2] (Practice Manual). The Minister disputes that the main application has lapsed because the 60 days for the filing of the record of the disciplinary hearing could only commence running after the dispatch of the record by Mr Khoza. Moreover, a portion of the record of the disciplinary hearing was served and filed in compliance with the Practice Manual. However, she contends that this application was launched as a precautionary measure, in the event it is found that the main application has indeed lapsed.

[3] At the initial hearing of the matter, on 1 September 2023, I, *mero mutu,* raised the question of whether clauses 11.2.3, 11.2.7 and 16 of the Practice Manual are applicable when one is dealing with a review application in terms of section 158(1)(h). The parties were accordingly directed to file supplementary

[1] Act 66 of 1996, as amended.
[2] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

heads of argument and the matter was postponed. The parties duly obliged and the hearing of oral submissions took place on 1 December 2023.

[4] This matter turns of the interpretation of section 158(1)(h) which provides:

> '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…'

Submissions

[5] The counsel for the Minister, Mr Matlatle, submitted that the Minister, as the head of a state department, in essence, seeks to review her own decision on permissible grounds and that remedy is not found in the Promotion for Administrative Justice Act[3] (PAJA). To buttress this submission, Mr Matlatle referred to the Constitutional Court's (CC) judgment in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [4] the state can review its own decision based on the principle of legality which is part of our law or an incident of the rule of law.

[6] Thus, to the extent that the Minister seeks to review the outcome of the disciplinary hearing against Mr Mahapa in terms of section 158(1)(h) of the LRA, the Practice Manual finds no application, so it was further submitted. In the alternative, the Minister contends that the delay in filing the record was due to Mr Khoza's remiss conduct. There were numerous requests for the record of the disciplinary enquiry but to no avail. To that extent, the Minister contends, the delay in filing the record did not offend the provisions of the Practice Manual.

[7] Mr Mahapa, on the other hand, persists that the main application has lapsed per the Practice Manual. Ms Gontsana, appearing on behalf of Mr Mahapa, submitted that since the main application is launched in terms of the LRA provision, there is no reason why the Practice Manual would not apply.

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[3] Act 3 of 2000.
[4] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (*Gijima*) at para 40.

[8] She further submitted that the main application is fraught with fatal challenges which include a failure to serve the review application on Mr Khoza and unreasonable delay in launching same. As such, the Minister failed to show good cause for the reinstatement of the lapsed main application.

Legal principles and application

[9] It is trite that a presiding officer appointed to chair a disciplinary hearing exercises power *qua* employer.[5] As such, I concur with the Minister that the conduct of the presiding officer is subject, like that of the employer, to be reviewed under section 158(1)(h). In *Hendricks v Overstrand Municipality and another*[6], the Labour Appeal Court (LAC) upheld the decision of the court *a quo* that, unlike state employees, the state, as an employer, does not have an incidental dispute resolution process available to it in terms of the LRA other than to avail itself to its right of review in section 158(1)(h). It was pertinently stated:

> 'The Labour Court has the power under s 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.'[7]

[10] In *Gijima*[8], referred to by the Minister, the CC in a judgment penned by Madlanga J and Pretorius AJ, unanimously held that PAJA does not apply when an organ of state seeks to review its own decision. It was further held that an organ of state seeking to review its own decision must do so under the principle of legality. The following observations are apposite:

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[5] *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another* [2009] ZASCA 123; 2010 (3) SA 201 (SCA); [2010] 2 All SA 150 (SCA); [2009] 12 BLLR 1170 (SCA); (2009) 30 ILJ 2653 (SCA) at paras 13 to 17.

[6] (2015) 36 ILJ 163 (LAC) (*Hendricks*) at para 29; see *also National Commissioner of the South African Police and Another v Nienaber N.O. and Another* [2017] ZALCCT 17; (2017) 38 ILJ 1859 (LC); [2017] 8 BLLR 840 (LC) at paras 6 and 8.

[7] *Hendricks, id.*

[8] *Gijima,* (id fn 4) at paras 37 to 40.

'[39] *Pharmaceutical Manufacturers* tells us that the principle of legality is "an incident of the rule of law", a founding value of our Constitution. In Affordable Medicines Trust the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

[40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. … The principle of legality may thus be a vehicle for its review…'[9] (Own emphasis and footnotes omitted)

[11] Moreover, in *Ramonetha v Department of Roads and Transport Limpopo and another*,[10] the LAC, per Savage AJA, as she then was, aptly stated:

> 'It is now trite that inherent in our constitutional order is the principle of legality in terms of which by virtue of the rule of law public functionaries, in their exercise of public power, are required to act within the powers granted to them by law and arrive at decisions which are lawful, not arbitrary and are rationally related to the purpose for which the power was given. There can be little doubt that the MEC's decision is capable of review under s158(1)(h) on the grounds of legality.'

[12] It follows that the review application in terms of section 158(1)(h) is premised on the principle of legality. As such, Mr Mahapa's contention that the LRA is applicable is untenable and stands to be rejected.

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[9] *Gijima,* (id fn 4).
[10] [2018] 1 BLLR 16 (LAC); (2018) 39 ILJ 384 (LAC); [2017] ZALAC 68 at para 21.

[13] The relevant procedure when it comes to the filing of a record in judicial reviews is provided in rule 53 of the High Court Rules. Rule 53(1) states:

> 'Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —
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> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
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> (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.'

[14] In *Turnbull-Jackson v Hibiscus Court Municipality and Others,*[11] the CC stated:

> 'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give a lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[15] While in *Helen Suzman Foundation v Judicial Service Commission*,[12] the CC explained the purpose of rule 53 as follows:

[11] 2014 (6) SA 592 (CC) at para 37.
[12] 2018 (4) SA 1 (CC) at para 13 to 15.

'[13] The purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

[14] Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

> Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed." (Own emphasis and footnotes omitted)

[16] Having found that the main application implicates the constitutional principle of legality, it follows that it had never lapsed or archived or deemed withdrawn as contemplated in the Practice Manual.

[17] The parties agreed, correctly so, that the alternative submissions by Mr Mahapa that pertain to delay in instituting the main application and non-joinder of Mr Khoza do not serve before me. They will be dealt with in due course by the court ceased with the review application.

Conclusion

[18] In all the circumstances, to the extent that the main application is a legality review in terms of section 158(1)(h), it was never defunct. Thus, this application is rendered superfluous. The parties are at liberty to take further steps in prosecuting the main application.

Costs

[19] The parties agree that costs shall be costs in the cause.

[20] In the premise the following order is made:

Order

1. The main application is not defunct as it is a legality review in terms of section 158(1)(h) of the LRA.
2. Costs shall be costs in the cause.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Adv. D Matlatle
Instructed by:	State Attorney, Pretoria
For the First Respondent:	Ms Z Gontsana of Mdluli, Pearce, Mdzikwana and Associates