IN THE HIGH COURT OF SOUTH AFRICA

(BOPHTUTHATSWANA PROVINCIAL DIVISION)

CASE NO: 458/06

In the matter between:

DR EMILY M MOGAJANE Applicant

and

THE PREMIER OF THE NORTH WEST PROVINCIAL GOVERNMENT 1st Respondent

THE MEC FOR THE DEPARTMENT AGRICULTURAL CONSERVATION & ENVIRONMENT (NORTH WEST PROVINCE) 2nd Respondent

CIVIL MATTER

DATE OF HEARING : 11 MAY 2006

DATE OF JUDGMENT: 19 MAY 2006

COUNSEL FOR THE APPLICANT : ADV W R MOKHARE

COUNSEL FOR THE RESPONDENTS: ADV M BRASSEY SC with ADV D WOOD

JUDGMENT

HENDRICKS J:

[1] On the 11th May 2005 after arguments were presented in this matter, I granted an order in terms of paragraphs 1, 2 and 4 of the draft order, the contents read thus:-

> "1. That the decision of the first respondent contained in the letter dated 28 March 2006 addressed to the applicant is hereby reviewed and set aside.
>
> 2. An order reinstating the applicant as head of department and Deputy Director General of the Department of Agriculture, Conservation and Environment of North West Provincial Government with immediate effect.
>
> 4. That the respondents are ordered to pay the applicant's costs jointly and severally the one paying the order to be absolved."

[2] I also ordered then that reasons will follow. Here follows the reasons for granting that order.

A. Background:

[3] The Applicant was employed by the North West Provincial Government as Deputy Director General of the Department of Agriculture, Conservation and Environment from 01 March 2005.

[4] On 26 August 2005 she was precautionary suspended and later on formally charged. A disciplinary hearing was conducted between 06 February to 09 February 2006 and on the 22 February 2006 it was ruled in her favour.

[5] I need not deal with these proceedings in any detail as the matter is still pending in the Labour Court.

[6] On the 23rd February 2006 she reported for duty. She was denied access to the building on the instruction of the Second Respondent, who insisted that the Attorneys of the Applicant should communicate her return to work with him and that he is still in the process of obtaining legal advise regarding the outcome of the disciplinary hearing.

[7] Applicant's Attorneys were informed on 27 February 2006 that she is not entitled to return to work because Second Respondent was still in the process of taking advice.

[8] On 03 March 2006 the Applicant's Attorneys was informed that she should report for duty on 06 March 2006, and to meet with the Second Respondent at 09h00.

[9] On 06 March 2006, the Applicant did report for duty and was called to a meeting with the Second Respondent at 10h00. During this meeting she was informed by the Second Respondent that he had taken a decision to review the chairperson of the disciplinary hearing's ruling and instructed her to go home and not to resume her duties.

[10] Applicant then lodged an urgent application in the Labour Court against the refusal to allow her to resume her duties. The Respondents filed a review application to have the ruling

of the chairperson of the disciplinary hearing reviewed and set aside. This review application is still pending.

[11] Applicant's urgent application was dismissed on the basis that she suffers no prejudice because she is in a favourable position earning her salary whilst staying at home. I need not say anything more about the outcome of that urgent application.

[12] Out of desperation to have this matter come to finality, Applicant instructed her Attorneys to communicate to the Attorneys of the Second Respondent that they will agree to the review application that is pending in the Labour Court and that the matter be remitted to the chairperson for a decision on the merits so that the matter could be finalised expeditiously, seeing that that is what the Second Respondent wants.

[13] On 22 March 2006 a letter from the Second Respondent dated 20 March 2006 was telefaxed to the office of the Applicant's Attorneys.

The contents of this letter read thus:-

> "You are probably aware that the trust that should characterize the employment relationship between yourself and the North West Provincial Government has irretrievably broken down. The position you hold is a strategic post that requires the parties to the employment relationship to have such trust that enables them to operate at a standard or level higher than an ordinary employee.

The differences that exist between you and Government have rendered employment relationship intolerable. Prospects of the situation being remedied are also remote. Your conduct has furthermore seriously affected service delivery in the Department negatively.

> Furthermore there are serious charges of misconduct that have been levelled against you. The disciplinary proceedings have not been finalized due to a decision of the Presiding Officer which is still being reviewed by Government. All these factors demonstrate that it will be in the public interest to discharge you from the public service; alternatively, that your discharge will promote efficiency in services rendered by the Department.

As the Executive Authority of this Department, I would like to invite you to show cause why I should not recommend to the Premier, that your services as the Head of Department be terminated in terms of the relevant clause of your employment contract read with Section 17 (2) (c) of the Public Service Act 1994.

> I shall appreciate receiving your response before close of business on Friday 24th March 2006. If I do not receive your response by the due date, this matter will be finalized without any further reference to yourself."

[14] On the 23rd March 2006 Applicant's Attorneys responded by stating ***inter alia***:-

[a] there is no basis or ground laid in the letter for the allegation that the trust relationship between Applicant and the North West Provincial Government has broken down irretrievably, neither was evidence presented during the disciplinary hearing to proof this allegation.

[b] that the allegation that Applicant's conduct has seriously affected service delivery in the Department negatively is unsubstantiated. No specifics of this allegation were presented. Applicant also vehemently denied this allegation in particular because she had been on suspension since 26 August 2005.

[15] Furthermore, the following is stated in the letter:-

> "It is incomprehensible to believe that whilst the disciplinary enquiry has not, according to the Department been finalised, that our client would be discharged on different grounds, without giving her an opportunity to be properly formally charged and to be subjected to a disciplinary hearing wherein she would be given a proper opportunity to defend any allegations against her. Any new allegations of misconduct cannot justify the discharge of our client, without following a proper process. A dismissal in such circumstances would be unfair and unlawful, and all our client's rights in this respect are reserved."

[16] It was also categorically stated that the letter does not constitute a response or written representations as contemplated in the letter by Second Respondent.

[17] Though Second Respondent was asked to undertake that very day, in writing, not to discharge Applicant from service and to withdraw his letter, he did not find it necessary or appropriate to respond to this letter.

[18] Instead, the next thing that happened was that the Applicant's Attorneys received a letter from the First Respondent, dated 28 March 2006. Because of the importance of the contents of this letter, I find it necessary to reproduce same. It read thus:-

> "1. I refer to the letter from the MEC dated the 20th March 2006 as well as the response from your attorneys dated the 23rd March 2006.
>
> 2. I have considered the recommendation from MEC Mayisela regarding the termination of your services for reasons advanced in his above correspondence. I have further carefully considered your responses as contained in the letter from your attorneys.
>
> 3. Having considered both the recommendation and your representation, I have come to the conclusion that there is complete irretrievable breakdown in trust relations between yourself and government.
>
> 4. The following are reasons for the conclusion I have reached:
>
> 4.1 You have currently been on suspension for seven (7) months and facing serious charges. The hearing of this matter cannot be concluded due to various technicalities encountered in the process.

4.2 You have polarized the management and staff of the Department leading to infighting and demoralization.

4.3 You have continuously demanded apologies from government (your employer and supervisor) for lawful requests or instructions.

4.4 You have flatly refused an offer to negotiate your exit when informed of the terrible, undesirable and unbearable relations that currently exist between yourself and government.

4.5 You have continuously, during the disciplinary hearing and suspension, continued to issue negative statements about government in both the electronic and print media.

5. These entire factors have created a hostile climate with stakeholders and have led to deterioration in service delivery by the Department. Given the challenges that the Department is facing, it is imperative that leadership be given at all times by a Head of Department.

6. Given all these reasons, I have come to the conclusion that your discharge as Head of Department will be in the interest of public service and promote efficiency in the Department.

> Accordingly, I have decided to discharge you from the public service in terms of section 17 (2) (c) of the Public Service Act, 1994 read with clause 4 of your employment contract, with immediate effect.
>
> 7. We wish you well in your future endeavours."

[19] On 31 March 2006 the Applicant lodged this urgent application seeking ***inter alia***, to review the Respondents decision to dismiss her. An amended notice of motion dated 06 April 2006 was filed in which the Applicant claims final relief instead of interim relief. The matter was supposed to be argued on 13 April 2006 but was postponed by consent to 11 May 2006.

[20] The Applicant seeks in her amended notice of motion dated 06 April 2006, together with ancillary costs order, an order:-

[a] reviewing and setting aside the decision of the First Respondent terminating the employment of the Applicant, as contained in the letter dated 28 March 2006 addressed to the Applicant;

and

[b] immediate reinstatement of the Applicant as head of Department and Deputy Director General of the Department of Agriculture, Conservation and Environment of the North West Provincial Government.

B. **Nature of the Application and the Disputes**:

[21] This is a review application brought in terms of Section 6 (2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[22] It was contended on behalf of the Applicant that the Respondent's failure to institute disciplinary proceedings against her prior to her dismissal is procedurally unfair and constitutes a failure to comply with the requirement in Section 17 (1) (a) of the Public Service Act, 1994 ('PSA'). In addition, it is contended by the Applicant that the decision to dismiss her was taken arbitrarily and capriciously and was unreasonable.

[23] In response, it was contended by the Respondents that:-

[a] to the extent that procedural fairness is a necessary element when discharging an employee under Section 17 (2) (c) of the PSA, the Respondents have satisfactorily complied with the dictates of the ***audi alteram partem*** rule;

[b] in any event, the elements of procedural fairness is irrelevant to the enquiry because Section 17 (2) (c) of the PSA expressly authorises dismissal without a hearing where such dismissal is in the interest of the public service;

[c] if the Applicant is correct in asserting that procedural fairness requirements have not been met, then the

proper form in which to bring this application is the Labour Court and that this Court lacks the jurisdiction to hear this matter.

[24] I will deal with these contentions ***in seratium***.

C. **Jurisdiction**:

[25] Though Mr Brassey SC on behalf of the Respondents, did not vigorously advance argument on this point as it is contained in his heads of argument, he did not abandon it neither did he concede jurisdiction which necessitates a pronouncement on it.

[26] Mr Mokhare during his argument, handed in a copy of a unreported judgment of the Supreme Court of Appeal in the case of **United National Public Servants Association of South-Africa vs S J Digomo NO and Others**, case no 441/04 delivered on 02 September 2005 by Nugert JA, with whom four other Judges concurred.

[27] The following is stated in that judgment:-

> "The Appellant's claim in the present case was not that the conduct complained of constituted an 'unfair labour practice' giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in

the Constitution and that is protected by S 33 – which is clearly cognisable in the ordinary courts….

It is sufficient to say that the Appellant's claim as formulated in its application did not purport to be one that falls within the exclusive jurisdiction of the Labour Courts and the objection to the jurisdiction of the High Court ought to have been dismissed."

[28] In my view, the present review application is also not one that complains of "unfair labour practices" but the complaint is that the dismissal constitutes administrative action that was unreasonable, unlawful and procedurally unfair.

[29] In my view this Court does have the jurisdiction to entertain this application.

D. <u>Section 17 of the PSA and Procedural Fairness</u>:

[30] Section 17 of the PSA reads as follows:-

"**Discharge of officers**

(1)(a) subject to the provisions of paragraph (b), the power to discharge an officer or employee shall vest in the relevant executing authority, who may delegate the power to an officer and the said power shall be exercised with due observance of the applicable provisions of the Labour Relations Act, 1995 (Act 66 of 1995).

(b) notwithstanding paragraph (a) the power to discharge an officer, excluding a Head of Department, in terms of subsection (2)(e), shall be vested in the head of department.

(c) …

(2) Every officer, other than a member of the services or an educator or a member of the Agency or the Service, may be discharged from the public service –

(a) on account of continued ill health;

(b) owing to the abolition of his or her post or any reduction in or reorganization or readjustment of departments or offices;

(c) if, for reasons other than his or her own unfitness or incapacity, his or her discharge will promote efficiency or economy in the department or office in which he or she is employed, or will otherwise be in the interest of the public service;

(d) on account of unfitness for his or her duties or incapacity to carry them out efficiently;

(e) on account of misconduct;

(f) if, in case of an officer appointed on probation, his or her appointment is not confirmed;

(g) on account of misrepresentation of his or her position in relation to a condition or permanent appointment;

(h) if his or her continued employment constitutes a security risk for the State; and

(i) if the President or a Premier appoints him or her in the public interest under any law to an office to which the provisions of this act do no apply.

(3) …"

[31] It is contended by the Respondents that they have complied with the dictates of natural justice because they have afforded the Applicant the opportunity to be heard and to make representations before she was discharged.

[32] Reference was made to the unreported case of **Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others**, case no JR 782/05 in the Labour Court, delivered on 14 March 2006, in which Van Niekerk AJ stated the following:-

> "This conception of the right to a hearing prior to dismissal … is reflected in the Code [Schedule 8 to the LRA]. When the Code refers to an opportunity that must be given by the employer to the employee to stat a case in response to any allegations made against that employee, which need not be a formal enquiry, *it means no more than that there should be dialogue and an opportunity for reflection* before any decision is taken to dismiss."

[33] This submission stems from the fact that prior to dismissing the Applicant, the Second Respondent wrote a letter to the Applicant dated 20 March 2006, to which I had referred earlier on in this judgment.

[34] The response of Applicant's Attorneys to this letter is also stated earlier on in this judgment.

[35] In my view, it cannot be said that the requirements for procedural fairness had been met. Least of all can it be argued that there was dialogue between the Applicant and the Respondents.

[36] It is clear from the letter written by the Applicant's Attorneys that the allegations were denied and insofar as it was not clear, Applicant seeks clarity. Instead of affording her an opportunity to present her case and instead of responding to the request for clarity by the Applicant, the First Respondent dismissed her for totally different reasons.

[37] Although the letter of dismissal written by First Respondent refers to the letter of 20 March 2006 written by the Second Respondent, the dismissal is based on totally different reasons. It can hardly be said that Applicant was awarded an opportunity to respond or that there was dialogue.

[38] It was further submitted that Applicant elected not to respond to the letter of the Second Respondent and in so doing waived her right to be heard. I cannot agree with this submission. It can never be said that Applicant did not respond to the letter of the Second Respondent, because she did. Applicant cannot be dictated by the Respondents as to how she must respond thereto.

[39] She does have a constitutional right to be legally represented and she acted within her right to do so.

[40] The Second Respondent did not respond to the letter of the Applicant's Attorneys, and the letter of dismissal from the Frist Respondent came as a total surprise.

[41] In my view, it is not even necessary to deal with the requirements of Section 6 of PAJA because it is so glaring obvious that there was non-compliance with it and also no compliance with the rules of natural justice including the ***audi alteram partem*** principle.

[42] It must also be mentioned that there was non-compliance with the applicable provisions of the Labour Relations Act 66 of 1995 as stated in Section 17 (1) (a) of the PSA.

E. **A discharge in terms of Section 17 (2) (c) of the PSA does not require a hearing before the decision is taken**:

[43] It was contended on behalf of the Respondents that the dismissal under Section 17 (2) (c) does not require procedural compliance or at least do not require procedural compliance with the exactitude of the provisions of the LRA.

[44] It was submitted that a dismissal in terms of this Section is expressly authorised if it is in the interest of the public service.

[45] In the absence of an express provision in Section 17 (2) (c) requiring the giving of notice to an affected person or affording a right to be heard, the issue is whether the duty is present as a

matter of implication. An argument to the contrary can also be advanced.

[46] In terms of Section 17 (1) (a) the power to discharge an officer is vested in the relevant executing authority. In terms of Section 17 (1) (b) the power is vested in the Head of the Department. Section 17 (1) (a) directs that the power to discharge "shall be exercised with due observance of the applicable provisions of the Labour Relations Act, 1995 (Act 66 of 1995)".

[47] Section 17 (1) (b) states that a discharge may be made by the Head of the Department notwithstanding what is contained in paragraph 17 (1) (a).

[48] It is contended by the Respondents that on a proper reading of the PSA, the exercise of the power to dismiss under Section 17 (2) (c) does not include an application of the right to a hearing because the true concern of this sub-section is with the administration of the Department and the protection of the public interest.

[49] It was argued that to infer a right to a hearing under this Section where the public interest is at threat would defeat the very object of the statute, namely to protect those interest. I cannot agree with this submission.

[50] In the present case, one can hardly argue that the public interest is at threat.

[51] I am of the view that as far as possible, there must be compliance with the provisions of the LRA. Though it may not be possible to do so in every case, each case must be decided on its own merits.

[52] In my view, Section 17 should be read in its totality. The spirit and intention of the legislature becomes clear when this Section is read as a whole and not certain Sections in isolation. It

is clear that the legislature intended as a starting point that there should be compliance with the LRA when an officer is discharge from service.

[53] Hence, I am of the view that as far as it is possible, there should be observance of the requirements in terms of the LRA.

[54] I agree with the submission by Mr Brassey SC that:-

> "Section 17(2) lists nine different bases upon which an employee may be discharged from the public service. Dismissal for operational reasons is covered by subsections (*b*); (*c*), but only in the first part and (*f*). Dismissal on account of misconduct, incapacity or similar reasons is dealt with under subsection (*a*); (*d*); (*e*) and (*g*).
>
> These subsections, when read together with section 17(1)(a), which states that 'the power shall be exercised with due observance of the applicable provisions' of the LRA, can be said to contain an implied duty to hear as the employer must conduct the dismissal process in accordance with the provisions of the LRA governing dismissal for misconduct or for operational reasons"

[55] Section 17 (2) (c) contemplates dismissal in order to promote efficiency or economy in the department or office or where it will otherwise be in the interest of the public service.

[56] The dismissal of the Applicant, so it is submitted, is based on a "complete irretrievable breakdown in trust relations" between her and the department. This is denied by the Applicant.

[57] In my view, especially due to the fact that this averment is denied by the Applicant – although the impression is created in the letter of the Second Respondent that she is "aware"

thereof – she should have been given the opportunity to a hearing to ventilate her stance.

[58] It is clear that when dismissing the Applicant, the First Respondent purported to be acting under the provisions of Section 17 (2) (c) of the PSA. However, this provision does not authorize the First Respondent to discharge the Applicant without following a fair procedure and does not authorize the First Respondent to dismiss the Applicant without ensuring that a materially fair procedure is complied with. A complete disregard of the material procedure and the conditions prescribed by the empowering provision makes the decision unlawful and procedurally unfair and therefore reviewable and subject to be set aside.

[59] I do not think for one moment that her discharge is in the public interest or that the public interest was at threat.

[60] Mr Mokhare on behalf of the Applicant made mention of the fact that Section 17 of the PSA must be read in conjunction with Sections 23 and 33 of the Constitution. Section 23 of the Constitution provides for a right to fair labour practices. Section 33 of the Constitution deals with just administrative action.

[61] Mr Mokhare submitted that properly construed, the provisions of Section 17 (2) (c) of the PSA, specifically deals with the discharge of an employee or officer for operational requirements. The provision that the executing authority

must comply with the terms of the LRA when discharging an officer or an employee in terms of Section 17 (2) (c) of the PSA are contained in Section 189 of the LRA.

[62] Mr Mokhare also submitted that the decision taken by the First Respondent was taken arbitrarily and capriciously. The reasons advanced for the decision to dismiss are materially different from the allegations made in the letter of the Second Respondent.

[63] Applicant was not afforded an opportunity to respond to the allegations contained in the letter of dismissal which are totally different from those in the letter of the Second Respondent. It was therefore unfair to dismiss the Applicant based on allegations or reasons for which she was not afforded an opportunity to be heard. This is a breach of Applicant's constitutional right not to be unfairly treated and also a breach of the principles of natural justice.

[64] It is also a disturbing fact that whilst the disciplinary proceedings instituted by the Respondents are not yet finalised and still subject to review, which review is instituted by the Respondents in the Labour Court, the First Respondent terminated the services of the Applicant.

[65] This is clearly indicative of the fact that the Respondents acted arbitrarily and wanted to get rid of the Applicant at all costs.

[66] I am of the view that for the above mentioned reasons the decision of the First Respondent to dismiss the Applicant, must be

set aside.

F. <u>Costs</u>:

[67] I am of the view that costs should follow the result.

G. <u>Conclusion</u>:

[68] It is for the abovementioned reasons that I granted the order mentioned in the introduction of this judgment.

R D HENDRICKS

JUDGE OF THE HIGH COURT

Attorneys for the Applicant: ROUTLEDGE MODISE MOSS MORISS ATTORNEYS

c/o HLAHLA MOTLAMME ATTORNEYS