



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 414/18

In the matter between:

GERT SIBANDE DISTRICT MUNICIPALITY

Applicant

and

MOKOME SELEPE

First Respondent

JOHAN VAN ZYL N.O.

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

Third Respondent

Heard: Decided on the Papers

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 hand-down is deemed to be on 29 March 2021 at 18:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] In this opposed application brought in terms of section 158(1)(h) of the Labour Relations Act (LRA)¹, the applicant (The Municipality), seeks an order reviewing and setting aside the decision of the second Respondent (Chairperson) issued on 15 December 2017, consequent upon a disciplinary enquiry into allegations of misconduct levelled against the first respondent (Mr Selepe).

¹ Act 66 of 1995, as amended

- [2] In the ruling, the Chairperson had found that Selepe was not guilty of three out of four charges of misconduct levelled against him, and had issued a sanction of a written warning valid for a period of six months in respect of the one charge.
- [3] The Chairperson is an official of the third respondent (SALGA), a representative of local government. Selepe was charged with misconduct related to gross dishonesty; bringing the Municipality into disrepute; failing to comply with the conditions of his suspension; and failing to attend a disciplinary enquiry. The Municipality takes issue with the Chairperson's findings in respect of the first two charges.

The disciplinary proceedings and the Chairperson's findings:

- [4] The charges against Selepe came about against the following summarised background as testified upon by five witnesses called on behalf of the Municipality, including the Municipal Manager, Selepe, and two witnesses who testified on his behalf;
- 4.1 Selepe is currently employed by the Municipality as a Senior Manager: Disaster Management (Department of Community and Social Services). During November 2016, he was appointed by the Municipality to represent it as a member of a provincial freight databank update Steering Committee.
- 4.2 The project surrounding the provincial freight databank was conceived by the Mpumalanga Department of Public Works and Transport (The DPWRT), which had in turn, appointed a service provider, (Aurecon Consulting Engineers) (Aurecon), to execute it (*i.e.* the collection of the freight databank information).
- 4.3 The Steering Committee comprised of Selepe representing the Municipality, two other officials from other municipalities in Mpumalanga Province (*viz*, Ehlanzeni and Nkangala), members of Aurecon, and senior officials from the DPWRT.

- 4.4 Selepe was further required to report to the Head of the Department on the progress of the project. Selepe contended that he had regularly reported to the HOD, Mr Kunene throughout the project, and through personal discussions with him, emails and telephone calls. He contended that he had expected the HOD to regularly update the Municipal Manager on the progress made with the project. The Municipality however contends that he did not report to the HOD.
- 4.5 In order to effectively collect freight databank information, Aurecon requested that the municipalities should appoint Surveyors to perform that task from May 2017. A decision was also taken that the Surveyors appointed should be from the local communities in the municipalities forming part of the steering committee. In that regard, Aurecon was to prepare advertisements for the posts, which were then to be circulated in the communities falling under the three municipalities, inviting suitable candidates. Certain basic requirements were to be met by the applicants, including possession of a matric certificate, a South African ID, proof of residence, and an operational bank account.
- 4.6 The Municipality in this case contends that even though Aurecon had requested the municipalities to appoint the Surveyors, these appointments were to be made by those municipalities themselves in compliance with their own recruitment procedures, and not by Aurecon. It contends that Selepe had without authority, and without following any of its own internal procedures, or without adopting a transparent process, or even consulting with its Municipal Manager or its Human Resources Department, appointed 56 surveyors.
- 4.7 Selepe's contention however was that he had reported the decisions of the Steering Committee to appoint surveyors to the HOD of the Municipality, to whom he directly reported. He further contended that upon the advertisements for the positions having been delivered to the communities in the municipalities, he had enlisted the assistance of two officials in his department with the collection of the CVs of the applicants for the posts, which he had then presented to the Steering

Committee and Aurecon. The Steering Committee had then accepted the list, and Aurecon, which was going to be the employer of the Surveyors, had then prepared contracts of employment for the successful applicants.

4.8 It is common cause that upon the contracts of employment being presented to the Municipal Manager, the latter had issued instructions that appointments should not be confirmed, as the Municipality's recruitment and employment policies were not followed.

[5] In respect of charges 1 and to 2 which related to alleged gross dishonesty and bringing the Municipality into disrepute in relation to the recruitment of the Surveyors, the Chairperson made the following findings:

5.1 Even though Selepe did not inform the Municipal Manager of the decision to recruit Surveyors, he had nonetheless informed the HOD.

5.2 The positions as advertised were sought for the project involving an outside company, Aurecon, which was to be employer of the successful recruits, and not the Municipality. It was therefore not for the Municipality to incur expenses for the advertisement of the posts for the Surveyors to be employed by Aurecon, and there was therefore no basis to find Selepe guilty of dishonest conduct for the purposes of charges 1 and 2.

5.3 In regards to the charge related to Selepe's alleged failure to abide by the conditions of his suspension, the Chairperson concluded that Selepe was not at his place of residence on 16 and 25 September 2017 when attempts were made by the Municipality to deliver documents. In this regard, since he was some 100km away from his residence when documents were delivered, he was therefore guilty of that charge.

5.4 Selepe however could not found guilty on the charge of failing to attend a disciplinary enquiry in that such a failure could not constitute misconduct.

The legal framework:

- [6] The principles applicable to review applications such as in *casu* are enunciated in *Hendricks v Overstrand Municipality and Another*², where it was *inter alia* held that the only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer, is the right to seek administrative law review. It was further held that section 158(1)(h) of the LRA empowers this Court to hear and determine reviews in this regard³ on the grounds (i) listed in Promotion of Administration of Justice Act (PAJA)⁴, 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'⁵.
- [7] The Municipality seeks a review of the Chairperson's findings on various grounds of misconduct, legality, irrationality and misdirection, with reliance on *Quest Flexible Staffing Solutions (Pty) Ltd (A division of Adcorp Fulfilment Services (Pty) Ltd v Legobatse*⁶. This is notwithstanding the fact that the LAC in that matter dealt with a review of an arbitration award under the provisions of section 145 of the LRA, where the *Sidumo*⁷ test found application.

² (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC)

³ At para 27

⁴ Act 3 of 2000

⁵ At para 29

⁶ (JA104/13) [2014] ZALAC 55; [2015] 2 BLLR 105 (LAC), where it was held;

"[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?" Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator."

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC)

- [8] Clearly the legal approach postulated by the Municipality in the light of the test enunciated in *Hendricks*⁸ is unsustainable as correctly argued on behalf of Selepe. The correct approach in relation to reviews under section 158(1)(h) of the LRA as pointed out on behalf of Selepe, is that as summarised by Snyman AJ in *South African Police Service & another v Ndebele and Others*⁹, which is that a party seeking a review under section 158(1)(h) of the LRA can competently do so where reliance is placed on the constitutional principle of legality. It is therefore apparent that the Municipality conflated the different tests applicable in respect of reviews sought under sections 145 and 158(1)(h) of the LRA.

The grounds of review and evaluation:

- [9] Notwithstanding the problems with the Municipality's approach as pointed out above, central to its contentions is that the Chairperson took irrelevant considerations into account when determining the guilt on the charges, since Selepe was not authorised to recruit or make any appointments. It contends that the recruitments were to be made between it and DPWRT, and that its processes were to be followed, with it being responsible for making the appointments. It denied that the recruitment process was entrusted in

⁸ *Supra*

⁹ Case no: JR 2395 / 14 (Delivered on 6 April 2017) (Unreported), where it was held;

"[43] In summary, where the applicant, being an employer in the public services sector, seeks to challenge a decision by a chairperson appointed to preside over disciplinary proceedings against a police officer, this can competently be done in terms of Section 158(1)(h) of the LRA based on the constitutional principle of legality, which requires that:

43.1 The decision of the chairperson must be rationally connected to the purpose for which the power was given to him or her, and if not, the decision could be considered to be arbitrary;

43.2 The decision of the chairperson must account for all the relevant facts placed before him or her. Where the chairperson fails to consider material facts or principles, the decision made can be said to be irrational;

43.3 The process giving rise to the decision must be lawful and fair;

43.4 The decision itself must be lawful, meaning that it is not a decision that falls outside the scope of the power afforded to the chairperson.

Should any one of the above requirements not be satisfied when the decision of the chairperson is considered, that decision would be irregular as contemplated by Section 158(1)(h) and would fall to be reviewed and set aside"

Aurecon, and that to the extent that Selepe had not followed its internal recruitment procedures, he had compromised its credibility and integrity.

- [10] The Municipality further takes issue with the Chairperson's findings that even though Selepe had informed the HOD of the recruitment process, he had nonetheless not informed the Municipal Manager. The Municipality contends that it was irrelevant whether Selepe had informed the HOD, as the relevant people to be informed was the HR Department and the Municipal Manager, and further that Selepe had indeed appointed the Surveyors when he had no authority to do so.
- [11] The Municipality also took issue with the questions posed by the Chairperson when determining whether Selepe was guilty of charges 1 and 2, and contended that the correct question to have been asked and answered was whether Selepe was involved in the recruitment process, and if so, whether he had in doing so, followed the Municipality's selection policy. It was contended that the question was not whether the recruitment process of the Municipality had applied in the circumstances.
- [12] Furthermore, the Municipality takes issue with the fact that Selepe had taken the initiative to get the recruitment process going, by enlisting the services of two officials in his department to collect CVs from potential recruits, without the posts first having been advertised, when in fact that process ought to have been initiated by the Municipality itself through the office of the Municipal Manager. The process of recruitment adopted by Selepe had according to the Municipality, caused consternation in the local community and potential recruits for the posts.
- [13] Whether the findings and the decision of the Chairperson ought to be reviewed on the grounds of legality involves a consideration of whether that decision can be said to be rationally connected to the purpose for which the power was given to him, and whether the Chairperson took account of all the relevant facts placed before him; followed a process that was not only lawful but fair, and whether his decision fell within the powers vested in him in the light of the issues he was required to determine.

[14] Having had regard to the facts of this case and the issues the Chairperson was required to determine and the approach he had followed, it is my view that the grounds upon which a review of his decision is sought are unsustainable for the following reasons;

14.1 In this case, the issue that the Chairperson had to determine was whether Selepe had acted in a grossly dishonest manner by unlawfully and intentionally initiating a recruitment process on behalf of the Municipality without following its procedures. The second part of the enquiry was whether the conduct in question if established, had brought the Municipality into disrepute and compromised its credibility and integrity. It follows that the irrespective of the Municipality's contentions and complaints about the questions posed by the Chairperson in determining guilt, the issues of having initiated the recruitment or being involved in it, and the application of the Municipality's recruitment policy in the circumstances were intertwined, to the extent that it was its contention that those policies ought to have been complied with.

14.2 The Municipality's contentions were that the advertisement for the posts were not publicised, or that Selepe had adopted a wrong manner of advertising the posts. Its further complaint was that prior to proceeding with the recruitment drive, Selepe ought to have left that decision to the Municipal Manager as the Accounting Officer, in order to ensure that the Municipality's own recruitment processes were adhered to, and to further ensure that the recruitment process was fair and transparent in accordance with its own policies and procedures.

14.3 In addressing the above issues, the starting point is that I did not understand it to be in dispute that the decision to initiate the recruitment of the surveyors emanated from the discussions and decision of the Steering Committee, nor was it in dispute that it was Aurecon that had requested the municipalities to recruit Surveyors to collect information.

- 14.4 I further find difficulties in appreciating how in circumstances where the Steering Committee had taken a decision on the recruitment, including having issued the advertisement, the Municipality can still insist that it was for it to initiate the recruitment drive, or that the posts were not in any event advertised.
- 14.5 One need only have regard to the minutes of the Steering Committee meeting held on 5 May 2017¹⁰, which clearly indicate that the advertisement were already out, and that the Districts were to receive applications from members of their communities.
- 14.6 Furthermore, it was agreed in that meeting that the District representatives including Selepe, would sit down with Lindiwe Phungala, the Manager in DPWRT, to finalise the list of recruits, and that the recruitment and hiring of Surveyors would be finalised by 12 May 2017. Nothing in those minutes is said about what the involvement of each Municipal Manager would be, or whether each municipality's recruitment policies and procedures should be followed in recruiting the Surveyors.
- 14.7 The DPWRT, which had conceived and overseen the project, had become involved in the recruitment as indicated in the minutes, to the extent that the list of potential recruits was to be verified with it.
- 14.8 Furthermore, to the extent that the recruitment was to be done through the municipalities and for/and on behalf of Aurecon, and where the successful recruits were to be employed and paid by that entity, I again fail to see why it was necessary for the policies and procedures of the Municipality to be followed, without necessarily duplicating a process already undertaken at the level of the Steering Committee.
- 14.9 It follows as correctly pointed out on behalf of Selepe that the Chairperson's approach in determining guilt in respect of the first two charges is unassailable, even if there are complaints about whether

¹⁰ See Annexure 'FA11' to the Founding Affidavit at page 84 - 85

that approach and reasoning was comprehensible or not. In the end, it is the substance of his findings that matter, and there is therefore no basis for a conclusion to be reached that his decision was not rational.

14.10 The Chairperson had answered the question whether Selepe was involved in the recruitment process, which in any event was a redundant question in view of his mandate emanating from the decision of the Steering Committee. The powers to be involved in the recruitment process, as opposed to making appointments, were vested in Selepe by that decision, and in view of the process agreed to at the Steering Committee in regards to the recruitments.

14.11 It is not clear on what basis the Municipality alleges that Selepe's conduct in being involved in the recruitment process was unlawful in circumstances where he was acting in accordance with the decisions of the Steering Committee. Even if it could be argued that Selepe was not supposed to have been involved in the recruitment process, and that the process ought to have been controlled by the Municipal Manager, in the end however, any recommendations Selepe as part of the Steering Committee had made in regards to the appointment of Surveyors, were not implemented. This was even after Aurecon had prepared the contracts of employment in that regard.

14.12 Thus, if ever there is any merit in the allegation that the Municipality's integrity and/or credibility was questioned in regards to how the recruitment process was conducted, Selepe's recommendations were not carried through, as the Municipal Manager had refused to sanction the appointments and embarked on a new recruitment drive. Thus, any harm if any, that was caused by the Selepe's approach in implementing the decisions of the Steering Committee was largely mitigated.

[15] In the end, I am satisfied that the Chairperson in arriving at his findings, took account all the relevant facts placed before him, followed a process that was not only lawful but fair, and that his decision falls within the powers vested in him in the light of the issues he was required to determine. Accordingly, the

decision of the Chairperson met the requirements of the legality test, and the review application ought to fail.

[16] I have further had regard to the requirements of law and fairness in regards to the question of costs. It must be stated that I had difficulties in appreciating the vigour with which this application was pursued. This is in circumstances where Selepe had acted in accordance with the mandate bestowed on him by the Steering Committee, and where the Municipality, despite the recruitment process initiated by the Steering Committee having gone to an advanced stage, had taken the posture that it needed to restart the recruitment process, simply because certain members of the communities had raised concerns about the recruitment drive. Once the Municipality had declined to confirm the appointments and re-started the recruitment process, one cannot speak of its integrity and credibility having been tarnished by any conduct on the part of Selepe. To this end, it is my view that this matter ought to have ended with the Chairperson's decision, and that Selepe should not be burdened with the costs of this application.

[17] Accordingly, the following order is made;

Order:

1. The Applicant's application to review and set aside the decision of the Second Respondent following disciplinary proceedings against the First Respondent, is dismissed with costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Representation:

For the Applicant:

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LABOUR COURT