REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA24/2013

In the matter between:

MARIUS HENDRICKS **Appellant**

and

OVERSTRAND MUNICIPALITY **First Respondent**

A MAGERMAN N.O. **Second Respondent**

Heard: **04 September 2014**

Delivered: **25 September 2014**

Summary: Interpretation of section 158(1)(h) of the LRA- Review of a ruling of the chairperson of a disciplinary hearing- employee challenging review of presiding officer in terms of section 158(1)(h). Presiding officer mandated by employer performing administrative act. Employer aggrieved by the disciplinary sanction of a presiding officer entitled to review sanction in terms of section 158(1)(h) of the LRA. *Ntshangase*, *Gcaba and Chriwa* considered. Review consonant with the prescripts of the Constitution and the common law principles of reasonableness, legality and rationality. Employee dismissed for dishonesty conduct and fraudulent misrepresentation – chairperson suspending employee and ordering written warning- Labour Court reviewing chairperson's finding- Evidence showing that employment relationship irretrievably broken down. Chairperson's finding unreasonable and irrational. Labour Court's decision upheld. Appeal dismissed.

Coram: Musi JA, Murphy AJA and Setiloane AJA

JUDGMENT

MURPHY AJA

[1]. This appeal invites us to re-consider the interpretation of section 158(1)(h) of the Labour Relations Act[1] ("the LRA") which provides that 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". The subsection is part of the section of the LRA which defines the powers of the Labour Court. The reason for the invitation to re-look at the interpretation of section 158(1)(h) is that there evidently exists apprehension among Labour Court judges[2] and some practitioners that the interpretation of the provision by the Supreme Court of Appeal ("the SCA") and this court ("the LAC") in *Ntshangase v MEC for Finance, Kwa-Zulu Natal and Another*[3] may be at odds with the rulings of the Constitutional Court in *Chirwa v Transnet and others*[4] and *Gcaba v Minister of Safety and Security and Others.*[5] The essential issue in dispute in this case is similar to that in *Ntshangase*. It involves the review of a decision of the presiding officer of an internal disciplinary hearing tasked with determining charges of misconduct levelled against the appellant. The presiding officer imposed a sanction less than dismissal. The Labour Court (Steenkamp J) reviewed and set aside the decision of the presiding officer and substituted it with one of dismissal. The appellant appeals against that decision with the leave of the court *a quo*.

[2] The appellant, Mr Hendricks, was the Chief: Law Enforcement and Security at the first respondent, Overstrand Municipality. He was responsible for *inter alia* administering general law enforcement in the municipality. The position was a senior one, and for obvious reasons the incumbent was expected to observe a high degree of integrity and honesty. The appellant was legally represented

[1] Act 66 of 1995.
[2] See *National Commissioner of the SA Police and another v Harri No and others* (2011) 32 ILJ 1175 (LC).
[3] 2010 (3) SA 201 (SCA).
[4] (2008) 29 ILJ 73 (CC).
[5] 2010 (1) SA 238 (CC).

and supported by his trade union (IMATU) in all the proceedings up to his successful application for leave to appeal to this Court. His attorneys withdrew when he was unable to place them in funds to argue the appeal. They nonetheless filed detailed and well-reasoned heads of argument upon which we have been able to rely. The appellant appeared before us in person and after making certain submissions sought a postponement which the first respondent opposed. We refused the postponement on the grounds that the issues were fully ventilated on the papers and in the heads of argument. Moreover, further delay would have been prejudicial to both parties in that the appellant would have been saddled with the costs of the postponement and legal fees, while the first respondent would be expected to continue paying the appellant his salary for the duration of any postponement. The court is well placed to deal with the appeal as all the evidence and argument in relation to it are properly before us.

[3] On 6 August 2012, the appellant was served with a notice to attend a disciplinary hearing to answer three charges, namely:

i) rude, abusive, insolent, provocative, intimidatory or aggressive behaviour to a fellow employee, one Rudi Fraser, the Chief of Traffic Services;

ii) dishonesty, including fraudulent misrepresentation; and

iii) breaches of the code of conduct.

[4] A disciplinary hearing was held and chaired by the second respondent in terms of the Disciplinary Procedure and Code Collective Agreement ("the code"), a collective agreement concluded nationally under the auspices of the South African Local Government Bargaining Council ("SALGBC"). The employer parties in SALGBC are represented by the employers' organisation the South African Local Government Association ("SALGA") and the employees by two trade unions, SAMWU and IMATU. The first respondent is bound by the collective agreement by virtue of being a member of SALGA. Clause 4.2 of the code records that it is a product of collective bargaining and the application thereof is deemed to be a condition of service of all

employees. In terms of clause 6 of the code, in the event of misconduct by an employee that appears sufficiently serious to warrant a sanction more serious than a written warning, the municipal manager must establish a disciplinary hearing to conduct the enquiry and appoint a suitable person to serve as a presiding officer. Clause 7 deals with the procedural requirements of the hearing. Clause 7.5 bestows upon the presiding officer the powers to impose any one of the typical sanctions, including written warnings, suspension, the withholding of salary increments, demotion and dismissal. Clause 7.7 provides that the presiding officer's determination cannot be altered by the municipal manager or any other governing structure of the municipality and shall be final and binding subject *inter alia* to any other remedies permitted by law.

[5] On 23 November 2012, the second respondent found the appellant guilty on the first two charges. The appellant had pleaded guilty on the first charge. The second charge was to the effect that the appellant had committed misconduct by fraudulently submitting representations for the withdrawal or reduction of his personal speeding fines on the false grounds that the fines had been incurred in the course and scope of his official duties. In particular, he instructed a subordinate, Constable Samuels, to draft false representations for the withdrawal of speeding fines which had been issued to him. He then signed the representations which he knew to be false. The second respondent imposed a sanction of a final written warning valid for 12 months on the first charge; and suspension without pay for 10 days, coupled with a final written warning valid for 12 months, on the second charge.

[6] In February 2013, the first respondent made application to the Labour Court seeking orders reviewing and setting aside the determination on sanction and replacing the determination on sanction with the sanction of dismissal. The application was made in terms of section 158(1)(h) of the LRA, with the first respondent arguing that the determination was irrational and unreasonable and that it was entitled to a review on these grounds which "are permissible in law". The premise of its submission is that the conduct of the appellant, given his position, had destroyed the trust relationship and hence that continued

employment would be intolerable, meaning that the only rational and reasonable sanction in the circumstances would be dismissal.

[7] The court *a quo* held that a review was competent under section 158(1)(h) of the LRA, set aside the determination of the second respondent and substituted it with a sanction of dismissal. The learned judge, although not explicitly stating as much, seems to have characterised the decision of the presiding officer as administrative action, as defined in section 1 of the Promotion of Administrative Justice Act[6] ("PAJA"), and set it aside on the grounds that it was irrational and unreasonable, being the grounds of review of administrative action stipulated in section 6(2)(f)(ii) and section 6(2)(h) of PAJA respectively. The term "administrative action" is defined in section 1 of PAJA to mean any decision (being of an administrative nature) taken by an organ of state when exercising a constitutional or public power or performing a public function in terms of legislation which adversely affects the rights of any person and which has a direct, external legal effect. Certain exercises of power, which are not relevant in this case, are excluded from the ambit of the definition.

[8] The appellant's first ground of appeal is that the court *a quo* erred in finding that the first respondent was entitled to approach the court on review in terms of section 158(1)(h) of the LRA to challenge the finding of the presiding officer under the code; in particular by failing to find that the judgment of the SCA in *Ntshangase* was inconsistent with the decision of the Constitutional Court in *Chirwa* and had in effect been overruled in *Gcaba*. Should we hold that *Ntshangase* has indeed been impliedly overruled it will be dispositive of the appeal in that the court *a quo* would have lacked power to review and set aside the determination.

[9] The appellant's contention that the Labour Court does not have the power to review the decision of the presiding officer of a disciplinary hearing, either at the instance of an employer or an employee, is predicated upon certain *dicta* of the Constitutional Court in *Chirwa* and *Gcaba* in relation to the interplay between the constitutional provisions regulating fair labour practices and just

[6] Act 3 of 2000.

administrative action. Section 23 of the Constitution provides that everyone has the right to fair labour practices and further entrenches various rights of free association, organization and collective bargaining, including the right to strike. Section 33 of the Constitution entrenches the right to just administrative action by providing *inter alia* that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) obliges Parliament to enact legislation to give effect to the right to just administrative action, which it has done in the enactment of PAJA.

[10] In *Chirwa*, Ncgobo J, while accepting that the dismissal of an employee by a public entity involved the exercise of a public power, held that such was not decisive of the question whether the exercise of the power in question constitutes administrative action. He held that the subject matter of the power involved in that case was the termination of a contract of employment and that such did not involve an act of administration. He concluded:[7]

> 'Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under section 33 (of the Constitution) can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognizes that employment and labour relations and administrative action are two different areas of law ….. The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement …. The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practices.'

[11] The Constitutional Court endorsed this statement in *Gcaba* and commented further on the relationship between the constitutional right to fair labour practices and the right to administrative justice as follows:[8]

> 'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The

[7] At paras 143-144.
[8] At para 64.

> ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer or consequences for other citizens, it does not constitute administrative action.'

[12] These *dicta* of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices (unfair conduct relating to promotion, demotion, training, the provision of benefits and disciplinary action short of dismissal) should ordinarily pursue the remedies available in section 191 and 193 of the LRA, as mandated and circumscribed by section 23 of the Constitution. The court made no explicit finding in either case in relation to section 158(1)(h) of the LRA.

[13] As mentioned, the facts in *Ntshangase* were similar to those in the present appeal. The appellant in that case was charged and convicted of twelve counts of misconduct involving allegations of wilful or negligent mismanagement of the State's finances and of abusing his authority which had caused the respondent significant financial loss. The presiding officer of the disciplinary hearing, appointed in terms of the applicable collective agreement, imposed a final written warning. The respondent reviewed the determination relying ultimately upon section 158(1)(h) of the LRA. The Labour Court dismissed the application. However, the LAC reversed that decision, upheld the application for review and substituted a decision of dismissal for that imposed by the presiding officer.[9] The LAC did not explicitly deal with the provisions and wording of section 158(1)(h), but relying on the Constitutional Court's finding in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[10] that compulsory arbitration before the CCMA constitutes administrative action, stated:

> 'It seems to me that if the conduct of compulsory arbitrations relating to dismissal disputes under the Act constitutes administrative action, then the

[9] See *MEC for Finance, KwaZulu-Natal v Dorkin NO* (2008) 29 ILJ 1707 (LAC).
[10] 2008 (2) SA 24 (CC).

> conduct of disciplinary hearings in the workplace where the employer is the State constitutes, without any doubt, administrative action. If it constitutes administrative action, then it is required to be lawful, reasonable and procedurally fair. Accordingly, if it can be shown not to be reasonable, it can be reviewed and set aside.'

The LAC made no reference in its judgment to the definition of administrative action in PAJA, nor did it elucidate upon how the exercise of power by the presiding officer of a disciplinary hearing fell within its ambit.

[14] The SCA in *Ntshangase* agreed with the *dicta* of the LAC and held that the determination was indeed administrative action. It stopped short of saying that the whole gamut of review grounds under PAJA were therefore available, confining itself to the more general proposition that such administrative action had to be lawful, reasonable and procedurally fair in terms of section 33 of the Constitution, noting also that the determination was reviewable on grounds of rationality (presumably in accordance with the dictates of the principle of legality).

[15] The decisions of the LAC and the SCA are accordingly weighty authority for the assertion that a determination by a presiding officer appointed under a collective agreement applicable in the public sector is reviewable on grounds of lawfulness, rationality, reasonableness and procedural fairness. The question is whether these decisions are inconsistent with the earlier decision of the Constitutional Court in *Chirwa* and have been overruled by implication in the later decision of *Gcaba*.

[16] The starting point is to look more closely at the language of section 158(1)(h). It states that decisions and acts performed by the State in its capacity as employer are reviewable by the Labour Court "on such grounds as are permissible in law". On the assumption that a determination by an independent presiding officer at a disciplinary hearing is a decision or act of the employer (a matter to which I will revert later), the Labour Court can review that decision or act and the essential enquiry should be whether the grounds of review are "permissible in law".

[17] The crux of the appellant's objection in this case is that the SCA and the LAC in *Ntshangase* erred in holding the decision of the presiding officer to be administrative action and hence he maintains that review under PAJA is not permissible in law. Relying on *Chirwa* and *Gcaba*, the appellant argued that by terminating an employee's contract, the state employer exercises a contractual power (rather than an administrative one) which has been circumscribed by collective bargaining.

[18] The submissions of the appellant rest, in my opinion, on too narrow an interpretation of the decision of the Constitutional Court in *Gcaba*. The court there expressly qualified its pronouncement that employment issues do not amount to administrative action *"within the meaning of PAJA"* by adding that such would "generally" be the case. It also was careful to observe that the "*ordinary thrust"* of the right to administrative justice is to deal with bureaucratic relationships and not relationships between the State as employer and its workers. However, the Constitutional Court has also recognized that deciding what is and what is not administrative action is a difficult task to be done on a case-by-case basis.[11] Regard must be had to the source of the power, the nature of the power, its subject matter and how closely it is related to policy matters or to the implementation of legislation. It is the nature of the power and the context of its application which are usually decisive.

[19] A municipality is an organ of state as defined in section 239 of the Constitution. When such a body acts to discipline a senior employee who holds a public or quasi-public office in law enforcement, it can be seen to be exercising a public power or performing a public function in terms of local authority legislation and any applicable statutory collective agreement. The power of the disciplinary tribunal in this instance arises from the provisions of a statutory collective agreement. Such agreements are not entirely or exclusively contractual in nature, especially when concluded in a bargaining council between an employers' organisation and trade unions. The manner of their conclusion and the application of their terms to non-parties impart a

[11] *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

quasi-legislative quality to them. Section 23(1)(c) of the LRA provides that a collective agreement concluded by an employer's organization or trade union will be binding on its members. Moreover, the power to discipline under a collective agreement is often delegated to a functionary over whom the employer has limited control, just as clause 7 of the code vests the power to discipline or dismiss in a presiding officer, appointed by the municipal manager (the employer), who has autonomy to impose a sanction which is final and binding. Clause 14 of the code stipulates that the decision is not appealable by the employer, but clause 7.7 provides that the decision on sanction is subject "to any other remedies permitted by law". This structural arrangement points to an intention to reserve to the employer a right of review in relation to the disciplinary sanction.

[20] Besides the peculiar structural elements of the agreement arising from the process of collective bargaining, the decision of the presiding officer *qua* employer is a decision of an administrative nature by an organ of state performing a public function in terms of the legislation governing local government. It is also a decision informed by policy considerations related to the exceptional requirements of probity applicable to the position held by the appellant. The Constitution and the suite of local government legislation require municipalities to function effectively, efficiently and transparently. One of the principal objects of local government is to provide for democratic and accountable government to local communities.[12] The first respondent has a public duty to eradicate corruption and malfeasance from within its ranks and structures. These factors therefore bolster the conclusion that the decision of the presiding officer, looked at in context, was indeed administrative action within the meaning of PAJA, it being the exercise of a statutory public power or the performance of a public function which has a direct, external legal effect in its consequences for ratepayers and citizens in general.

[21] But it is probably unnecessary to go that far. There is strictly speaking no need to classify the decision as administrative action in terms of PAJA before

[12] See sections 6, 50, 51 and 55 of the Local Government: Municipal Systems Act 32 of 2000 and section 61 the Local Government: Municipal Finance Management Act 56 of 2003. See also section 152(a) of the Constitution.

a review will be competent under section 158(1)(h). The provision does not say that the Labour Court may review decisions of the State acting as employer on the grounds of review applicable to administrative action under PAJA. The Labour Court may do so on any ground "permissible in law". Review under PAJA is only one kind of administrative law review. Other exercises of public power are reviewable on constitutional grounds of legality and rationality. As stated by the SCA in *NDPP v Freedom under Law,*[13] the legality principle has become well established in our law as an alternative pathway to judicial review of exercises of public power where PAJA finds no application. The principle permits review on grounds of both legality and rationality.[14]

[22] Moreover, our courts in the pre-democratic era held that disciplinary tribunals constituted by contract were susceptible at common law to judicial review on grounds of both reasonableness and procedural fairness.[15] Although our administrative law of review has been constitutionalized and codified in PAJA, the codification has not repealed and substituted all aspects of the common law of judicial review. The extent to which the common law of administrative law remains relevant to administrative review must be developed on a case-by-case base.[16] The question which arises is whether our new constitutional dispensation has altered the law in relation to the review of private or quasi-public disciplinary tribunals. The issue was pertinently, and, in my respectful view, correctly addressed by Claassen J in *Klein v Dainfern College*[17] as follows:

> 'No rational reason exists to exclude individuals from the protection of judicial review in the case of coercive actions by private tribunals not exercising any public power. To my mind, the Constitution makes no pronouncement in respect of this branch of private administrative law. Thus, continuing to apply

[13] 2014 (4) SA 298 (SCA) 309B-D; see also *MEC for the Department of Health, Western Cape v Weder* (2014) 35 *ILJ* 2131 (LAC) at para 33.
[14] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC)
[15] *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); and *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).
[16] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); and *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SCA 674 (CC).
[17] 2006 (3) SA 73 (T) at para 24.

> the principles of natural justice to the coercive actions of private tribunals exercising no public powers will in no way be abhorrent to the spirit and purport of the Constitution.'

[23] The same, I might add, holds true for the application of the principles of rationality and reasonableness. The existence of this type of review, as I have just intimated, does not derive directly from the application of the Constitution or PAJA. It exists as a consequence of the judicial development of the common law. The common law principles of administrative law have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain force from the Constitution. The common law and the Constitution have become intertwined. The doctrine permitting the review of private disciplinary review tribunals therefore should continue as part of our law, at least until sound reasons for jettisoning it are found. Its continuation can be justified in terms section 39(2) of the Constitution on the grounds that it promotes the spirit, purport and objects of the constitutional right to just administrative action, a consideration which the courts are obliged to heed when interpreting legislation and when developing the common law. The judicial review of contractual disciplinary tribunals on administrative law grounds is in line with the spirit and purport of the Constitution.[18] This would be especially so where, as in the present case, there is no other remedy or process available to review the impugned act of the State in its capacity as employer.[19]

[24] Moreover, there is no basis for suggesting that the common law in this regard has been repealed or made redundant by either PAJA or the Constitution. In addition to the presumption of statutory interpretation that the legislature is presumed to alter the existing law minimally, section 39(3) of the Constitution provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law to the extent that they are consistent with the Bill of Rights. The review of private or contractual disciplinary proceedings was fashioned by the courts in service of human rights in the sense that it involved a realisation that members of

[18] Hoexter *Administrative Law in South Africa* (1st ed) 124-125.
[19] *MEC Department of Education Kwazulu Natal v Khumalo* [2010] 11 BLLR 1174 (LC).

seemingly private organizations often have little or no real choice over the terms of agreements made applicable to them. This case furnishes a good example, involving as it does the application of an agreement concluded by collective bargaining and made enforceable by legislation. The retention of a right of judicial review of any exercise of powers under the terms of such a contract is manifestly consistent with the Bill of Rights.

[25] Accordingly, the submission by the appellant that review should be excluded because of the contractual arrangement and the private nature of the power is not well-founded. The judicial review of contractual disciplinary proceedings is permitted in our law and consequently the first respondent's application for review is permitted on these grounds, which are "permissible in law" as contemplated in section 158(1)(h) of the LRA.

[26] But the written submissions filed on behalf of the appellant go further than this. They make the additional structural and prudential argument that employment issues should be regulated exclusively in the insulated scheme of section 23 of the Constitution and the LRA. It is contended that such an approach accords with the prescription of the Constitutional Court in *Gcaba* and that the LAC and SCA decisions in *Ntshangase* are not in conformity with that direction. As I have already suggested, the submission is guilty of overstatement. The Constitutional Court made it clear in *Gcaba* that although compartmentalisation of labour rights and administrative justice rights should ordinarily be maintained, courts should avoid rigid categorisation. It elaborated as follows:[20]

> 'First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the *actio iniuriarum* in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental

[20] At para 53-55.

reasons for a separation. Therefore, rigid compartmentalisation should be avoided.

It is, furthermore, generally accepted that human rights are intrinsically interdependent, indivisible and inseparable. The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.

A related principle is that legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights.'

[27] The underlying guiding rationale of the *ratio decidendi* in *Gcaba* and *Chirwa* is that once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.[21] In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. The *ratio* cannot justifiably be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. Section 191(1)(a) of the LRA expressly restricts these remedies to "the dismissed employee or the employee alleging the unfair labour practice". 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; and section 158(1)(h) of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer. Moreover, as explained earlier, in the present case Clause 7.7 of the code, properly interpreted, does not amount to a contractual abandonment of all remedies. On the contrary, the proviso to the clause discloses an intention to retain a right to seek review by subjecting a final and binding determination to "any other remedies permitted by law". The

[21] *Gcaba* at para 56.

intention is one of excluding an appeal by the employer while allowing for a review. As mentioned, the right of appeal against a presiding officer is available in terms of clause 15 of the code only to employees.

[28] Besides being entitled to bring a review in terms of the common law, as I have explained, the first respondent is equally entitled to review the decision of the presiding officer on the ground of non-compliance with the constitutional principle of legality. As with review under PAJA such a review, based on the principle of the rule of law in section 1(c) of the Constitution, requires the decision to be categorised as an exercise of public power, which for the reasons already stated I accept that it is. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary.[22] Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.

[29] In sum therefore, the Labour Court has the power under section 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". The findings of the LAC and the SCA in that regard in *Ntshangase* are not inconsistent with the findings of the Constitutional Court in *Gcaba* or *Chirwa*, which are restricted to conclusions that unfair dismissals and unfair labour practices will normally not constitute administrative action on account of adequate alternative remedies existing under the LRA. Neither *Gcaba* nor *Chirwa* made any reference to *Ntshangase*, or, as I have said, section 158(1)(h) of the LRA. *Chirwa* was decided before *Ntshangase*, while *Gcaba* was handed down shortly after it. More recently, in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal,*[23] the

[22] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85.
[23] (2014) 35 *ILJ* 613 (CC) at para 32.

Constitutional Court cited *Ntshangase* with approval, indicating implicitly that it saw no inconsistency in the approach followed in that case with its own earlier pronouncements.

[30] Concern was expressed by Steenkamp J in *National Commissioner of the SA Police and Another v Harri No and others*[24] that the existence of a remedy allowing administrative review of disciplinary tribunals may result in something of an anomaly in that the imposition of a lesser sanction can be viewed as administrative action from the perspective of the employer while it will be a labour practice from the perspective of an aggrieved employee. That is true. But, as the Constitutional Court pointed out in *Gcaba,* it is not unusual for the same facts to give rise to different causes of action. An employer reviewing a sanction will normally be seeking a severer penalty, while the employee will be alleging an unfair labour practice and seeking no sanction or a lesser sanction. Should an employee seek an administrative law review of a lesser sanction he or she risks a finding, in accordance with the line of thinking in *Gcaba*, that the decision is not administrative action in terms of PAJA or that judicial policy as expressed in the Constitution dictates that the common law be developed to confine the remedy of review in section 158(1)(h) to legitimate challenges where there is no other available remedy. If a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for their resolution.

[31] Insofar as a review of the decision of a presiding officer by an employer under section 158(1)(h) appears anomalous in that it involves the review of a decision which in law is its own, the SCA in *Ntshangase*, taking guidance from its own decision in *Pepcor Retirement Fund and another v Financial Services Board,*[25] and keeping in mind the effective delegation that occurs through the provisions of collective agreements negotiated by collective bargaining at

[24] (2011) 32 ILJ 1175 (LC).
[25] 2003 (6) SA 38 (SCA).

industry level, held that the employer had *locus standi* to bring a review. It said in this regard:[26]

> 'Undoubtedly, the second respondent has an interest in ensuring that fair labour practices are upheld in its employment relationships. The same holds true for its employees. All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all the relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with section 195 and 197 of the Constitution. I, therefore, find that the second respondent had the necessary *locus standi* to take Dorkin's action on review to the Labour Court.'

The reasoning is a sound exposition of the requirement of standing in this context. I respectfully agree with it. Moreover, and in any event, recently, in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal,*[27] the Constitutional Court approved the finding of the SCA on this issue.

[32] In conclusion, therefore, the first respondent had the standing and right to seek review of the second respondent's decision on administrative law grounds by the Labour Court in terms of section 158(1)(h) of the LRA.

[33] It is common cause that the appellant was correctly found guilty of the misconduct with which he was charged. The most serious aspect of the misconduct is the element of dishonesty associated with his having signed off on representations prepared on his behalf, which he knew were untrue, and by which he intended to have his speeding fines quashed and thereby to benefit financially. The first respondent contends that the sanction of suspension without pay for 10 days coupled with a final written warning effective for 12 months is an inappropriate sanction which is so startlingly

[26] At para 18.
[27] (2014) 35 *ILJ* 613 (CC) at para 32

disproportionate and unreasonable that no reasonable person could have reached such a decision. The appellant argued that the second respondent applied his mind to all the evidence, concluded that the relationship had not irretrievably broken down and thus made a decision within the boundaries of reasonableness.

[34] The second respondent was evidently aware of the seriousness of the second charge on account of the element of fraudulent dishonesty. However, he reasoned that it cannot be simply accepted from the nature of the offence that the relationship between employer and employee had been irretrievably eroded. This needed, in his view, to be proved on the evidence and he determined that the employer had not proved that the relationship of trust had broken down irretrievably. He was also of the opinion that the ease with which and the manner in which the quashing of the speeding fines was sought and accomplished showed that the practice was a common one and thus less deserving of censure. He further took account of the fact that the appellant had a clean record and that his job was primarily an administrative one.

[35] The first respondent submitted in the Labour Court and in this Court that an analysis of the reasons for the sanction disclosed that the second respondent failed to appreciate the seriousness of the second charge. Counsel for the first respondent, Mr Steltzner SC, emphasised before us that the offence involved more than “an element” of dishonesty, as the second respondent found but was in fact a grossly dishonest act, committed with deliberate intent and involved the instructing of subordinates to participate in the commission thereof. It therefore involved a significant abuse of authority and possibly criminal conduct by the official in the municipality tasked with overall responsibility for law enforcement. His conduct, it was argued, rendered him wholly unsuitable to occupy his post. The existence of a practice to quash staff fines after making representations, if such was the case, could not condone the making of fraudulent representations by an official in the position of the appellant.

[36] As for the prevalence of the practice, it ought to have been self-evident, according to the first respondent, that the appellant, as the person responsible

for the eradication of the practice, was expected to lead by example and not to legitimise and perpetuate it. The evidence before the disciplinary hearing points to a lack of appreciation on the part of the appellant of the nature, effect and employment implications of his conduct. Counsel submitted quite rightly that not dismissing the appellant in the circumstances will convey an impression of laxity to more junior employees. If the most senior employee responsible for maintaining law and order in the organisation is treated too leniently for dishonest misconduct, more junior employees could argue on the basis of consistency that they are entitled to expect equal if not greater leniency.

[37] Moreover, dishonesty, malfeasance and impropriety at the highest level of any organisation will invariably impact negatively on the culture of probity within the organisation. The problem is well captured in the colloquial adage: "the fish rots from the head down". It was submitted therefore that little weight should be attached to the appellant's clean record. The mere facts of the appellant's position, the nature of the misconduct, and his active involvement of his subordinates in it, are sufficient to sustain an inference that the requisite degree of trust in the relationship had been irretrievably damaged.

[38] The second respondent, it was contended, wholly failed to apply his mind properly or to give consideration to these material considerations with the consequence that the decision he reached on sanction bore no rational relationship to the evidence and the purposes of the disciplinary code with the result that it was irrational and additionally was so unreasonable that no reasonable decision-maker could have made it. The presiding officer's failure in this regard, it was further argued, was compounded by his attaching no or insignificant weight to the appellant's demonstrated lack of credibility in his testimony, which further brought his integrity into question.

[39] The appellant aligned his submissions with the reasoning of the second respondent. He emphasised his record of 17 years clean service, his relatively harmonious relationship with his superiors and the fact that discipline should be corrective and progressive. The evidence, he maintained, was insufficient to support a finding that the relationship had irretrievably broken down and the

continuation of the relationship had become intolerable. Consequently, he submitted, the decision of the second respondent was both rational and reasonable.

[40] Steenkamp J in the Labour Court essentially agreed with the first respondent. The learned judge was much influenced in his conclusion by the nature and requirements of the position of trust held by the appellant. He stated:

> 'In that eponymous position, he should have ensured that the law is enforced; instead, he flouted the law and then dishonestly tried to defeat the ends of justice. If that does not signal the destruction of a trust relationship with his employer, a state entity charged with serving the ratepayers of the Overstrand, not much will.'

The second respondent also placed reliance upon his understanding that the misconduct was remote from the appellant's actual duties, taking into account as a mitigating factor the fact that "die klagtes totaal verwyder is van Hendricks se pligte as Hoof: Wetstoepassing". In relation to this, the court *a quo* said:

> 'The finding that the charges were not connected to the employee's duties is also entirely irrational and devoid of logic. The employee falsely misrepresented exactly that to be the position, i.e. that he incurred the speeding fines in the execution of his official operational duties. That was a lie. Yet the chairperson accepts the fact that it was not so connected, contrary to the employee's evidence, as a mitigating factor.'

[41] The learned judge's final conclusion is worth repeating in full. He said:

> 'Given the seriousness of the misconduct and the position of the employee as chief of law enforcement, the sanction imposed by the chairperson was irrational and unreasonable. He clearly did not apply his mind to the factors outlined above. The mitigating factors that he took into account do not remove the operational need of the municipality to ensure that senior officials in those positions are exemplary in their conduct and can be trusted by the municipality and by the public. There is also a constitutional obligation on the municipality imposed by section 152 of the Constitution to provide accountable government for local communities; to ensure the provision of

> services to those communities; and to promote a safe and healthy environment. If the employee were to remain in the employ of the municipality, it would be failing in its duties to its ratepayers.'

I agree with this succinct and lucid summation and see no need to add to or elaborate upon it. The logic of it and its rationale are unassailable. Accordingly, the learned judge did not err in setting aside the second respondent's determination on the grounds of irrationality and unreasonableness. He also did not err in deciding not to remit the matter to the disciplinary hearing. The nature and gravity of the misconduct are such that dismissal is the only appropriate sanction; there would be no purpose in remitting it, and hence the learned judge acted correctly by substituting a sanction of dismissal.

[42] As regards costs, sight ought not to be lost of the fact that the appellant was defending the decision of an internal tribunal which was in his favour. He probably assumed reasonably enough that there was merit in his case. His dismissal is likely to lead to some hardship. In the circumstances, it is justifiable not to make any order as to costs.

[42] In the result, the appeal is dismissed.

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JR Murphy AJA

I agree

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Musi JA

I agree

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Setiloane AJA

APPEARANCES**:** FOR THE APPELLANT: In person

FOR THE RESPONDENT: Adv RGL Steltzner SC

Instructed By: Fairbridges Attorneys