IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

Case No: 5248/08

In the matter between:

BHEKANI PAULOS KHAWULA Applicant

and

DANNHAUSER LOCAL MUNICIPALITY First Respondent

M. V. PHATSOANE Second Respondent

JUDGMENT

VAN ZÿL, J. :-

1. In this matter the applicant seeks to review and set aside a decision of the first respondent. The order sought is as set out hereunder, namely:-

   "*1. It is declared that when the First Respondent's Council resolved on 4 March 2008:*

   (a) not to accept the recommendation in the 'Outcome of Appeal Hearing', dated 1 February 2008, issued by Second Respondent; and

   (b) to confirm the decision to dismiss Applicant,

First Respondent's Council acte ultra vires the disciplinary code and procedure that was meant to apply in respect of the disciplinary proceedings conducted by First Respondent against Appellant.

2. *The said resolution of First Respondent's Council is hereby set aside.*

3. *First Respondent is ordered;*

   (a) *to give effect to the rulings and recommendation contained in the said 'Outcome of Appeal Hearing' issued by the Second Respondent.*

   (b) *to re-instate Applicant pursuant to such recommendation.*

4. *Alternatively to paragraph 3 above, Second Respondent is ordered to make a final determination, in terms of clause 14.12 of the South African Local Government Bargaining Council Disciplinary Procedure, in the appeal lodged by the Applicant.*

5. *First Respondent is ordered to pay to Applicant that remuneration that he would have earned had First*

Respondent accepted Second Respondent's said recommendation.

6. *First Respondent is ordered to pay the costs of this application.*"

2. The first respondent has actively opposed this review application whilst the second respondent has taken no active part therein and abides the decision of the court. Although the papers herein are voluminous, the background giving rise to the review application may conveniently be summarised before the issues in dispute are considered in greater detail.

3. Applicant was appointed as the Municipal Manager of the first respondent, a local municipality in northern KwaZulu-Natal, in terms of a written agreement (annexure MBS3) concluded on 20 June 2006. Notwithstanding the date of conclusion, the period of employment was agreed to commence on 5 June 2006 and to extend until expiry through the effluxion of time with effect from 5 December 2012.

4. Clause 4.2 of the employment contract is of relevance to subsequent events. It reads, as follows –

"*4.2 …, this agreement may be terminated immediately by the Council without compensation or payment in lieu of notice if any circumstances arise justifying such termination at common law or in terms of the applicable labour laws if the Municipal Manager does not fulfil his obligations in terms of the performance agreement referred to hereinafter, provided that the Municipal manager shall be entitled to a legal appeals procedure before a final decision is made regarding non-performance.*"

5. During May 2007 first respondent instituted disciplinary proceedings against applicant, who was then formally charged with six counts of alleged misconduct at a disciplinary inquiry presided over by a practicing attorney, one Mr L. Verveen and who was especially appointed for this purpose. Each of applicant and first respondent was duly represented at the inquiry, which commenced with effect from 4 July 2007. At the conclusion thereof it held applicant guilty on counts 1, 2, 3, 4 and 6. He was acquitted on count 5.

6. The subsequent appeal was presided over by second respondent, also a practising attorney, who was likewise especially appointed for this purpose. The conclusions of the appeal are contained in a written document headed "*Outcome of the Appeal Hearing*". After analysis of the issues, evidence and argument, the conclusions

reached by second respondent on appeal regarding the guilt of the applicant were that the appeal succeeded in part, in that:

a. The findings of the disciplinary inquiry on count 1 were not sustainable and that applicant should instead have been held to be guilty on the alternative to count 1.

b. Equally the findings of the disciplinary inquiry on counts 2 and 3 were not sustainable and applicant should instead have been held not to be guilty on both of these counts.

c. The findings of the disciplinary inquiry on counts 4 and 6 were sustainable and the disciplinary inquiry correctly found applicant guilty in regard thereto.

7. In the light of her appeal conclusions regarding the guilt of applicant on the misconduct charged, second respondent then proceeded to consider the appropriateness of the sanction of dismissal, as recommended by the disciplinary inquiry. Second respondent concluded that such sanction was too severe. She expressed the conclusion to which she came, as follows:-

"*In the premise I recommend that the employee be given final written warning in respect of each of the three offences committed.*"

8. Subsequently applicant was advised that the appeal report would be considered by the full council of the first respondent and he was invited to be present and to address the council in regard thereto. Applicant declined to do so, contending that the first respondent was bound by the appeal decision of the second respondent and not at liberty to reconsider the matter. As a result first respondent's council resolved, in the absence of the applicant, to dismiss him from the employ of the first respondent.

9. The attack upon review is not aimed at the second respondent's findings on appeal, either in regard to applicant's misconduct, or the sanctions as recommended by her. Whilst applicant contends that he does not accept that he is guilty of any misconduct whatsoever, he seeks to have the decision by the first respondent to dismiss him set aside on review and at the same time to implement the appeal recommendations as made by second respondent, all by way of an order of this court. That much is clear, for instance, from the relief sought in paragraph 3 of the notice of motion, as set out above.

10. Applicant contends that the first respondent's decision to terminate his employment was taken *ultra* vires the powers of the council of first respondent, in that it lacked the power to disregard the appeal recommendations made by the second respondent.

11. In support of the view that first respondent was bound to put into effect such recommendations, it is argued that the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006, as contained in Government Notice R805 in Government Gazette 29089 of 1 August 2006 and promulgated in terms of s120 of the Local Government : Municipal Systems Act 32 of 2000 ("*the Act*"), are applicable to the employment relationship between applicant and first respondent. Reliance is then placed upon Regulation 17(2), which deals with the termination of a contract of employment and which provides that –

> "*The employer will be entitled to terminate the employee's employment contract for any sufficient reason recognized by law, provided that the employer must comply with its disciplinary code and procedures, in the absence of which the disciplinary code and procedures of the South African Local Government Bargaining Council will apply, as well as in accordance with the Labour Relations Act, 1995 (Act No. 66 of 1995). Reasons for terminating the employment contract may include …* "

12. Applicant suggests that since the first respondent does not have its own disciplinary code and procedures, it follows that the disciplinary code and procedures of the South African Local Government Bargaining Council must then apply in the circumstances. In terms of Clause 14 thereof it is submitted that the presiding officer at an appeal tribunal has the power to confirm or set aside any decision, determination or finding of a disciplinary hearing, including the setting aside or reduction of any penalty imposed and that he has the "*sole discretion*" to make an order on appeal. It follows, so the argument ran, that the second respondent was bound to make a final determination upon the issues on appeal and that first respondent was, as a matter of law, obliged to accept and implement such determination. In failing to do so and indeed, in deciding upon a penalty different from that determined by second respondent, first respondent thus acted *ultra vires* its powers, so that the review must succeed.

13. Recognising that second respondent had, in fact, not purported to make any final ruling or determination of the issues on appeal, but limited herself to merely making a recommendation, the applicant in the alternative seeks an order (as per paragraph 4 of his notice of motion and as set out above) directing second respondent to make such a final determination.

14. Assuming, but without deciding, that the provisions of the disciplinary code and procedures of the South African Local Government Bargaining Council do apply to the circumstances under consideration, then applicant claims that the code requires the appeal tribunal "*… to make a final determination on the question concerning my guilt and the sanction to be imposed.*" (see : paragraph 28.1 of his founding affidavit). This approach, however, loses sight of the fact that the code does not expressly require such "*final determination*" at all. Clause 14.11 of the code empowers the "*Presiding Officer (*of the appeal tribunal*) in his sole discretion shall be entitled to make whatever order he deems reasonable in the circumstances.*"

15. That is a far cry from a final determination of the guilt or penalty concerned. Notionally the appeal tribunal could decide that there are issues which require clarification by the leading of further evidence and refer the matter back to the disciplinary hearing or, as here, content itself with a recommendation to the employer. If a recommendation to the first respondent (as employer) is legally permissible, then that undermines the argument that the first respondent was duty bound to adopt and was indeed powerless to resist the second respondent's recommendation.

16. The meanings of "*recommend*" include "*To mention or introduce (a thing) with approbation or commendation (to a person), in order to*

induce acceptance or trial." and that of "*recommendation*" means "*That which procures a favourable reception or acceptance. Exhortation, advice.*" (see : The Shorter Oxford English Dictionary on Historical Principles (1978)). A recommendation thus inevitably implies the possibility of rejection of the commendation, so that the person or body to whom the recommendation is directed may decline to follow the recommended course of conduct and adopt a different course of action. It follows that first respondent was not, based upon this argument, obliged to implement second respondent's recommendations regarding the sanction to be meted out to applicant for his misconduct.

17. But there are more fundamental difficulties which arise from applicant's argument that that the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006, ("*the regulations*") as well as the disciplinary code and procedures of the South African Local Government Bargaining Council ("*the code*") apply in the circumstances of this matter.

18. The first respondent contended that the regulations do not apply because the contract of employment was concluded on 20 June 2006 and the regulations were only promulgated on 1 August 2006. Accordingly, so it was argued, since the regulations have no retrospective application, the disciplinary process contemplated by

clause 4.2 of the employment contract had not been revoked or substituted thereby. Alternatively and if the regulations are held to apply, then regulation 17(2) provides that first respondent was entitled to apply its disciplinary code and procedures which, in this instance, are contained in clause 4.2 of the employment contract. Further alternatively and if it were held that clause 4.2 of the contract is not a disciplinary code and procedure and that the procedures prescribed by the code had to be followed, then that second respondent's recommendation fell within the ambit of the powers conferred upon her by clause 14.11 of the code and that an employer's power to reject any recommendation thus made to it, is not excluded by the code. The latter submissions have already been considered above and I indicated that I am of the view that clause 14.11 is permissive of the recommendations made by second respondent and that first respondent were not necessarily obliged to implement them but could, in suitable circumstances, reject them.

19. In my view, however, the argument for the application of the regulations to the employment contract between applicant and first respondent fails upon a far more fundamental consideration. Section 72 of the Act, which falls within Chapter 7 relevant to local public administration and human resources (sections 50 to 72 inclusive), provides for regulations to be promulgated in terms of section 120 of the Act. Section 120(7)(b) provides that –

"*120(7) Regulations made in terms of this section-*

(a) ….. ; and

(b) take effect on a date determined in the regulations, which must be the date of publication or a date after such publication."

Regulation 39(2) then provides that –

"*Employment contracts entered into before the effective date of the regulations continue to apply until such employment contracts have terminated in terms of the provisions of such contracts.* "

20. In the light of the foregoing it is therefore clear that the regulations do not apply to the employment of the applicant by the first respondent because their written agreement (annexure MBS3) was concluded on 20 June 2006 and, notwithstanding the date of its conclusion, the period of employment was agreed to commence on 5 June 2006 and to extend until expiry through the effluxion of time, with effect from 5 December 2012. Since the regulations were only promulgated on 1 August 2006, the relevant employment contract was entered into before the regulations came into force and in terms of regulation 39(2) the contract therefore continues to apply and is unaffected by the regulations.

21. Clause 4.2 of the employment contract provides for an appeal procedure "*… before a final decision is made regarding non-performance*". It follows that the appeal procedure was not intended by the parties to the contract as the final word on the outcome of any alleged non-performance. The only decision making body in such event would be the council of the first respondent, or its executive where delegated powers have been conferred upon it by the full council. In the circumstances the action of the second respondent in making a recommendation upon appeal is procedurally sound.

22. Counsel for the first respondent submitted that the decision by first respondent not to follow second respondent's recommendation and instead to dismiss the applicant, was not *ultra vires* the powers of the first respondent in the circumstances. In my view that submission is correct.

23. On behalf of first respondent it was then submitted that the decision to dismiss was unassailable and that the application should be dismissed, with costs. I do not think that the latter submission necessarily follows, merely because the first respondent was not obliged to follow the second respondent's recommendation and had the power to dismiss the applicant. It remains to consider whether that power was properly exercised in

all the circumstances and if not, whether that decision should be set aside on review.

24. Counsel for the applicant also submitted that the parties, by agreement between them, instructed second respondent to finally determine the issues in dispute and that, by reason thereof, it was not competent for the first respondent to depart from the sanction recommended by the second respondent. In this regard counsel relied, *inter alia*, upon the unreported judgment of Rampai, AJ in the Johannesburg Labour Court in the matter of the Greater Letaba Local Municipality v L S Mankgabe NO & Ors (JR3108/05) ZALC 74 of 3 October 2007.

25. However, at paragraph 17 of the judgment the learned Acting Judge remarked that it was not competent to nullify the recommended sanction because there had been prior agreement between the employer and the employees' union that the determination of the disciplinary tribunal would be final and binding on the employer, save that the employee may lodge an appeal thereto. The present matter is different, in that there is no evidence of such an agreement between the applicant and the first respondent and as already indicated, the terms of clause 4.2 of the employment contract envisage that a further decision would be made, following upon the appeals procedure.

26. The question remains whether the applicant has shown grounds upon which the decision of the first respondent to dismiss him from its employment can be set aside upon review. There are no clear grounds advanced upon which such a review can be based. The arguments centred mainly upon the hotly disputed jurisdictional issue of the first respondent's *locus standi* to have departed from second respondent's recommendations. However, implied may be that the decision to terminate the services of applicant was grossly unreasonable in all the circumstances.

27. After the appeal recommendations of the second respondent became known the applicant, through his representatives, was invited to appear before and address the council of the first respondent before it deliberated and made any decision upon the recommendations of the second respondent. By virtue of the pro forma prosecutor's letter (annexure "C") the applicant was not only invited to appear, or to be represented at the intended deliberation of the council of the first respondent and where second respondent's recommendations would be considered, but he was also invited to actively participate and make representations in regard thereto. This invitation was declined. In my view the rule of *audi alteram partem* was thereby satisfied and the requirements of procedural fairness complied with in all the circumstances.

28. The next issue under consideration is whether the requirements of substantive fairness have been satisfied. In this regard it needs to be remembered that applicant was employed as the municipal manager and as such was the head of first respondent's administration and its chief accounting officer (see: section 55 of Act 32 of 2000). This involved not only a position of the utmost trust, but also a situation where the first respondent needed to rely upon the applicant as its eyes and ears in relation to the entire municipal administration. He was more than an ordinary municipal employee. The misconduct of which applicant was found guilty and which, for purposes of this review, is not in dispute, needs to be evaluated against that background.

29. On the first charge the applicant was found to have been negligent in obtaining payments, for his personal benefit, in respect of travelling expenses which he claimed and which amounted to unauthorised expenditures. Considering that, as municipal manager and chief accounting officer of the first respondent, the applicant was tasked with enforcing financial discipline on behalf of first respondent over the entire staff compliment of the latter, applicant may well be said to have abused his position of trust by benefitting himself at his employer’s expense, even by being negligent. However, the sixth charge also involved personal benefit to the applicant at the expense of the first respondent, but here negligence was not involved. The applicant, in this instance,

dishonestly abused municipal services at his residence when he was not entitled thereto. The motive was self enrichment at the expense of his employer, the first respondent.

30. On the fourth charge the applicant failed to report, or cause to be reported, the criminal conduct of the offender to the South African Police Services, as he was required by law to do. That failure was likewise of a serious nature in circumstances where the first respondent was entitled to be able to rely upon the trustworthiness, diligence and effectiveness of the applicant, as head of its administration.

31. There is nothing to suggest on what basis the council of the first respondent was required to exercise its discretion in arriving at a decision upon the recommendations of the second respondent. *Prima facie* it was entitled to act as it did and it would follow that the only challenge to the decision would have to be by way of review.

32. In 11Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A), Corbett JA (as he then was) at page 152 A-E stated the approach to an administrative review in the following terms -

"*1Broadly, in order to establish review grounds it must be shown that the president* (being the decision maker in that instance) *failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F - G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895B - C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid- Afrika en Andere 1976 (2) SA 1 (A) at 14F - G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8D - G; Goldberg and Others v Minister of Prisons and Others (supra at 48D - H); Suliman and Others v Minister of Community Development 1981 (1) SA 1108 (A) at 1123A.) Some of these grounds tend to overlap.*"

33. Applicant did not advance any of the recognised grounds for review, save possibly that the decision by the council of the first respondent was so unreasonable as to warrant the inference that it had failed to apply its (collective) mind properly to the matter before it. However, when the decision to dismiss is viewed against the nature of the misconduct committed by the applicant and the responsible position of trust which he occupied at the time in the administrative and financial spheres of the first respondent municipality, then it cannot be said that the decision was unreasonable to the extent where it becomes susceptible to being set aside on review.

34. In my view the attack upon the decision by the first respondent to terminate the employment of the applicant, in terms of the provisions of clause 4.2 of the employment contract, must fail. So also must the alternative claim requiring second respondent to convert her recommendations into a "*final determination*".

35. I see no reason why costs should not follow the result, nor have any been advanced during the course of argument. In the result the review application is dismissed, with costs.

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Date argued: 12 September 2008

Date delivered: 06 November 2009

Appearances:

For Applicant: Adv D. P. Crampton instructed by TomlinsonMnguni James Inc of Pietermaritzburg.

For First Respondent: Adv E. S. J. van Graan SC instructed by De Swart Vogel Mahlafonya c/o Tatham Wilkes Inc of Pietermaritzburg.

For Second Respondent: No appearance.