Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 641 / 2009

In the matter between:

THE NATIONAL COMMISSIONER OF POLICE	**First applicant**
THE PROVINCIAL COMMISSIONER OF POLICE	**Second applicant**
and	
SENIOR SUPERINTENDENT HARRI N.O.	**First respondent**
GORDON ROBERT LAMASTRA	**Second respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an unusual application for review. The applicants seek to review the decision of the first respondent in his capacity as the chairperson of a disciplinary enquiry in terms of section 158 (1)(h) of the Labour Relations Act[1]; alternatively, in terms of section 6 of the Promotion of Administrative Justice Act[2].

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[1] Act 66 Of 1995

[2] Act 3 of 2000

[2] The application arises from the first respondent's finding and award on 1 April 2009. He found that the second respondent (Lamastra, the employee) had committed serious misconduct by stealing darts from a Game store in George. He found that the employee had contravened regulation 20 (p) of the South African Police Service discipline regulations in that, while on duty, he conducted himself in an improper, disgraceful and unacceptable manner. The sanction he imposed was a fine of R500 and a suspended dismissal for a period not exceeding six months.

[3] The applicants submit that the sanction is too lenient and is unreasonable. They submit that the first respondent (the chairperson) ought to have imposed a sanction of dismissal. They submit that his decision could only have been reached by him, not exercising his discretion at all, alternatively, acting arbitrarily and failing to apply his mind to the facts and circumstances of the case. They also contend that the chairperson's decision is one which a reasonable decision-maker could not reach.

CONDONATION

[4] The application was said down for hearing on the unopposed roll for hearing today, 9 November 2010.

[5] Four court days before the hearing, on 3 November 2010, the second respondent's attorneys filed a notice of motion asking for the application to be "adjourned" to the opposed roll. The notice of motion was accompanied by an affidavit asking for condonation for the late filing of an answering affidavit that was filed together with the notice of motion. On Friday, 5 November 2010, one clear court day before the hearing, the second respondent’s attorneys also filed heads of argument.

[6] The answering affidavit was filed almost one year later and their heads of argument some five months late. The applicants’ counsel agreed that I should treat the application filed by the second respondent as an application for condonation. He also agreed that that application could be heard today; and, if I were to grant condonation, that the matter could proceed as an opposed application.

[7] In deciding on the application for condonation, I am guided by the well-known principles set out *Melane Santam Insurance Co Ltd*[3] and followed in countless decisions after that.

[8] The extent of the delay is excessive. The application for review was filed on 1 September 2009. After the record had been delivered, the applicants filed their notice in terms of rule 7A(8) exactly one year ago, on 9 November 2009. The second respondent had to file his answering affidavit within 10 days after receipt of that notice, in terms of rule 7A(9). He only did so almost one year later. And this court issued a directive to the parties on 12 May 2010 to file their heads of argument within 15 days, i.e. by 14 June 2010. The second respondent's attorneys only did so some four and a half months later, and only one clear court day before the hearing.

[9] It would be useful to set out a timeline of events. The chairperson handed down his decision on 1 April 2009. The employee has been on paid suspension since then, getting paid R 24 000 per month. As I pointed out, the application for review was filed on 1 September 2009. The record of proceedings was made available on or about 23 September 2009. On 9 November 2009, the applicants filed their notice in terms of rule 7A(8), together with a supplementary founding affidavit. No answering affidavit was filed. On 12 May 2010, this court directed the parties to file their heads of argument within 15 days. The applicants duly did so on 14 June 2010. On 24 June 2010, in the absence of any heads of argument or answering papers filed by the second respondent, the registrar set the matter down for hearing on 9 August 2010 on the unopposed roll, on notice to both parties. Five days later, on 29 June 2010, the second respondent's current attorneys (Van der Merwe Du Toit Inc) came on record. They wrote to the state attorney to say that "writer" had received instructions in this matter on 11 June 2010. "Writer" did not explain why they had taken no further steps in the period from 11 to 29 June. Inexplicably, though the letter was dated 29 June 2010, he stated that he would be on leave in the Western Cape from 16 to 29 June 2010; would

[3] 1962 (4) SA 531 (A) at 532

consult with the second respondent during that time; and undertook to file an opposing affidavit "shortly thereafter." On 7 July 2010, the second respondent's attorneys filed a notice of intention to oppose, but no answering affidavit. On 12 July 2010 the state attorney's Ms Colleen Bailey wrote to attorneys Van der Merwe Du Toit Inc to inform them that, since 9 August 2010 would be a public holiday, the registrar had allocated a new date for the hearing of the matter, i.e. 9 November 2010. Ms Bailey also stated: "As you are aware, your client is completely out of time since heads of argument was (*sic*) filed on 14 June 2010. A copy of same is included for your attention. We now await your client's answering papers herein." On 13 July 2010 the registrar sent a notice of set down to both parties, removing the matter from the roll on 9 August 2010, and re-enrolling it for 9 November 2010. There was no further action from the respondent's attorneys until 25 October 2010, when they made some proposals to the state attorney. On 26 October 2010, the state attorney's Ms Bailey again wrote to the second respondent's attorneys advising them that "[o]ur client is of the opinion that the matter should proceed as set down". Ms Bailey had also advised the second respondent personally on a number of occasions telephonically before he was represented by his attorneys of record that he ought to file his answering affidavit and heads of argument. It is only on 2 November 2010 that the second respondent filed his answering affidavit. On 3 November his attorneys filed the application for "adjournment "; and on 5 November they filed their heads of argument.

[10] The explanation for the delay is that the employee placed the matter in the hands of his trade union, the South African Police Union (SAPU). This is after he came to the conclusion that he could not afford the services of the attorney who represented him at the disciplinary hearing. It appears that the union did nothing to oppose the application for review until it informed the employee in July 2010 – eight months after the applicants had filed their notice in terms of role 7A(8) – that it would now appoint attorneys to represent him. At that time, the union was of the view that it was not settled law that the decision of a functionary appointed by the SAPS was

open to review and that it would be in the public interest to oppose the matter. Shortly thereafter, the employee's current attorneys told him that the law is now settled and that the relief sought is in fact competent. For some reason, the employee says that "this caused a major rethink within the ranks of the executive" of the union and that it was only during the last week of October 2010 that the union resolved to assist him in any event.

[11] The second respondent and his attorneys offer no proper explanation for their inactivity in the period from 29 June 2010 – when the attorneys came on record – to 2 November 2010. Neither does the second respondent adequately explain his own failure to act in the prior seven months. It is not enough to say that he left the matter in the hands of his trade union. He was made aware of his obligations by the state attorney. He could either have taken steps to file a short answering affidavit himself, perhaps with the assistance of a colleague in the police service or in the trade union; or, given that he was earning a not insubstantial salary whilst on suspension, he might have persuaded the attorney who represented him in the disciplinary enquiry and who was already *au fait* with the facts to spend an hour or two to draft a short answering affidavit.

[12] It will become apparent from my judgement on the merits that I do not consider the second respondent to have good prospects of success in the main application.

[13] Mr *Van Eetveldt*, for the second respondent, submitted that it is in the interests of justice that his client should be placed in a position to oppose the review application. He also submitted that his client is suffering prejudice. But that prejudice is outweighed by the prejudice to the applicants. The South African Police Service has been paying the employee's salary of R 24 000 per month for the last seven months. It is in the public interest that matters concerning the *fiscus* and the use of taxpayers' money be resolved speedily. The employee has offered no adequate explanation for the delay in opposing the application. In these circumstances, he has not made out a proper case for condonation.

[14] For these reasons, I dismissed the application for condonation. The matter therefore proceeded on an unopposed basis. The applicants asked for their costs in the condonation application. I take into account that the employee has, to a certain extent, been let down by his trade union and his attorneys. Although that does not entitle him to condonation, I do take that factor into account with regard to costs. In law and fairness, I consider it fair that each party should pay its own costs in the condonation application.

THE MERITS

Administrative action

[15] This is not an application to review and set aside the decision of an arbitrator of the CCMA or a bargaining council. The decision sought to be reviewed is that of a functionary of the South African Police Service acting in his capacity as a chairperson of a disciplinary enquiry. Does this constitute administrative action?

[16] In *Chirwa v Transnet Ltd and others*[4] and *Gcaba v Minister of Safety and Security and others*[5], the Constitutional Court decided that matters relating to the employer-employee relationship, even in the public service, does not constitute administrative action for the purposes of PAJA. But that is not the end of the matter. Those cases concerned, respectively, a dismissal and decision not to appoint an employee in the public sector.[6] The case before me concerns the review of a decision of the state as an employer as contemplated in section 158 (1) (h) of the LRA. That section provides that the Labour Court may "review any decision taken or any act

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[4] 2006 (4) SA 367 (CC)

[5] (2010) 31 *ILJ* 296 (CC)

[6] There is no need to deal with *Fredericks & others v MEC for Education & Training, Eastern Cape* 2002 (2) SA 693 (CC) and similar cases preceding it, as the conflicting decisions leading up to the decision of the Constitutional Court in *Gcaba* have now been settled by that decision.

performed by the state in its capacity as employer, on such grounds as are permissible in law ".

[17] Skweyiya J stated unequivocally in *Chirwa*[7] that her dismissal by Transnet did not constitute administrative action under section 33 of the Constitution. In his separate but concurring judgement, Ngcobo J explained his decision thus[8]:

"The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not, in my view, constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of state which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of adminstration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33."

[18] Expanding on the question whether the dismissal was administrative action under PAJA, Langa CJ stated:

"… I conclude that the applicant's dismissal did not constitute the exercise of a 'public' power or the performance of a 'public' function, and therefore was not administrative action under PAJA. It is important to note, however, that my reasoning does not entail that dismissals of public employees will never constitute 'administrative action' under PAJA. Where, for example,

[7] supra, at para [73]

[8] Para [142]

the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which is carried out or by virtue of the class of public employee dismissed, the requirements of the definition of 'administrative action' may be fulfilled."[9]

[19] Similarly, in *Gcaba*[10] the court stated: "Generally, employment and labour relationship issues could not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 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."

[20] The Constitutional Court has thus put it beyond dispute in *Chirwa* and *Gcaba* that the dismissal of a public service employee does not constitute administrative action. Why, then, should the state as employer be able to review a decision by its own functionary in this case?

[21] The distinction appears to me to lie in the fact that, in this case, the state is acting *qua* employer; and the functionary is fulfilling his or her duties in terms of legislation.

[22] Section 33 (1) of the Constitution[11] provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[23] In an attempt to define administrative action, the Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and others*[12] held that:

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[9] para [194] (my underlining)

[10] *Supra* para [64]

[11] Constitution of the Republic of South Africa, 1996

[12] 2000 (1) SA 1 (CC) at para [141] (my emphasis)

"In section 33 the adjective ‘administrative’ and not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.”

[24] That test may not be determinative in the light of the *dicta* of the Constitutional Court in *Chirwa*[13] and *Gcaba*. But the Labour Appeal Court and the Supreme Court of Appeal have recently dealt with a matter that is essentially on all fours with the one before me – hence the concession by the second respondent's attorneys that the law is now settled in this regard.

[25] In *MEC for Finance, KwaZulu-Natal & another v Dorkin NO & another*[14] the appellants sought to review and set aside a decision taken by the first respondent, in his capacity as chairman of a disciplinary enquiry into allegations of misconduct, to give the second respondent (the employee) a final written warning after he (the chairman) had found the employee guilty of several counts of misconduct. The appellants were aggrieved by the imposition of a final written warning which they viewed as too lenient a sanction.

[26] In the celebrated case of *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[15] the Constitutional Court held that compulsory arbitrations in terms of the LRA are different from private arbitrations. Commissioners exercise public power, which impacts on the parties before them. The court concluded that a commissioner conducting a CCMA arbitration is performing an administrative function.[16]

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[13] *Chirwa v Transnet & others* 2008 (4) SA 367 (CC)

[14] [2008] 6 BLLR 540 (LAC)

[15] 2008 (2) SA 24 (CC)

[16] at paragraph [88]

[27] In *Dorkin*[17] *t*he Labour Appeal Court, relying on *Sidumo,* held that, if the conduct of compulsory arbitrations relating to dismissal disputes under the LRA constitutes administrative action, then the conduct of disciplinary hearings in the workplace, where the employer is the State also constitute, 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.

[28] The decision of the Labour Appeal Court in *Dorkin*[18] was upheld by the Supreme Court of Appeal in *Ntshangase v MEC for Finance, KwaZulu-Natal & another*[19]. The SCA held that the second respondent, the MEC for Education, was an organ of state as envisaged by s 239 of the Constitution. The court also held that the MEC exercises public power in the public interest in terms of legislation. When the MEC appointed Dorkin to preside over a disciplinary hearing, it did so in its capacity as the State. It followed that the MEC's action qualified as administrative action. The MEC appointed Dorkin in terms of a collective agreement, known as "Resolution 2". The procedure embodied in Resolution 2, the court held, has statutory force which is buttressed by section 23 of the LRA. Consequently, the powers exercised by Dorkin in terms of Resolution 2 qualify as public power or a public function, which has statutory authority in terms of section 23 of the LRA.[20]

[29] Members of the South African Police Service are appointed in terms of the South African Police Service Act [21], read with section 212 (4) of the Constitution. In terms of section 24 of the SAPS Act, the Minister may make regulations concerning *inter alia* labour relations, including matters

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[17] *supra*

[18] *supra*

[19] 2010 (3) SA 210 (SCA)

[20] *Ntshangase* paras [13] and [14]

[21] Act 68 of 1995

regarding suspension, dismissal and grievances, the conduct of disciplinary enquiries, conduct by members that constitutes misconduct and the issue of the code of conduct for the Service.

[30] The Minister has made regulations.[22] Those regulations embody a procedure negotiated and agreed upon by the employer and all the trade unions party to the Safety and Security Sectoral Bargaining Council. In terms of regulation 14, the employer must appoint an employee as chairperson of a disciplinary enquiry, save in exceptional circumstances.

[31] The applicants *qua* the state appointed the first respondent as chairperson of the employee's disciplinary enquiry in this case. As in the case of *Ntshangase*, the action of the chairperson qualifies as administrative action. That being so, the action must be lawful, reasonable and procedurally fair.

Is the decision reviewable?

[32] If it is administrative action, the question remains whether the chairperson's decision is reviewable at the instance of the applicants. If so, is the decision reviewable under PAJA or in terms of section 158 (1) (h) of the LRA?

[33] In *Ntshangase*, the SCA held that the decision of a chairperson appointed by the MEC can be taken on review under section 158(1)(h). The court tantalisingly stated that "the vexed legal question remains whether Dorkin's decision is reviewable at the instance of the second respondent (the MEC) or not. If so, is it under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or s 158(1)(h) of the LRA?[23]

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[22] Regulations for the South African Police Service, issued under section 24 (1) of the Act in Agreement 1/ 2006.

[23] Para [14] at 207 J

[34] The court answered the second question in the affirmative. Referring to s 158(1)(h), the court said[24]:

"Undoubtedly this section provides in explicit terms that a decision like the one taken by Dorkin who acted qua his employer can be reviewed on such grounds as are permissible in law. The ground relied upon by the second respondent for the review of Dorkin's decision is rationality, which is one of the recognised grounds of review. I am therefore of the view that Dorkin's decision can be taken on review under section 150 81H of the LRA."

[35] Bosielo AJA went on to say that he agreed with Zondo JP[25] in his judgement in the Labour Appeal Court where he stated in paragraph 10:

> "It seems to me that if the conduct of compulsory arbitrations relating to dismissal disputes under the [Labour Relations] Act constitutes administrative action, then the conduct of disciplinary hearings in the workplace where the employer is the State constitutes, without any doubt, administrative action. If the constitute 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."

[36] Unfortunately, the court did not go on to decide whether PAJA also applied. It addressed the question whether the employer had the *locus standi* to take the matter on review. It came to the conclusion that, as the chairperson was a public functionary exercising a public power, the employer could take the chairperson's decision on review in terms of section 158(1)(h) of the LRA. It did not, as far as I could establish, express a view on the applicability of PAJA.

[37] Against that background, it is clear that the applicants can take the decision of the first respondent (the chairperson of the disciplinary enquiry) on review in terms of section 158(1)(h) of the LRA.

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[24] At para [15] 208 B-C

[25] (as he then was)

[38] The test to be applied on review remains that outlined in *Sidumo*, i.e. whether the decision of the chairperson was so unreasonable that no reasonable decision maker could have come to the same conclusion. In *Ntshangase*, the court said in this regard:

"I agree that Dorkin's decision, measured against the charges on which he convicted the appellant, appears to be grossly unreasonable. Given the yawning chasm in the sanction imposed by Dorkin and that which a court would have imposed, the conclusion is inescapable that Dorkin did not apply his mind properly or at all to the issue of an appropriate sanction. Manifestly, Dorkin's decision is patently unfair to the second respondent. To my mind, it fails to pass the test of rationality or reasonableness."

Was the chairperson's decision reasonable?

[39] The applicants contend that the decision reached by the first respondent is one which a reasonable person could not reach. They contend that he ought to have imposed the sanction of dismissal.

[40] The employee is a high-ranking officer in the SAPS. As a member of the police service, here is obliged to carry out the police service's constitutional obligation to prevent, combat and investigate crime. His post as sector commander requires of him to render crime prevention and social crime prevention with in the community.

[41] Furthermore, the Minister has issued a code of conduct that is binding on every SAPS member. It demands of every police officer to regard the truth as being of the utmost importance, to respect and to uphold the law at all times and to avoid any conduct which could result in members themselves becoming violators of the law. In terms of the code, police members commit themselves to "… act in a manner that is impartial, courteous, honest, respectful, transparent and accountable… [and to] work towards preventing any form of corruption and to bring the perpetrators to justice."

[42] The actions of the employee are far removed from these ideals. For the chairperson to have found that he is suitable to remain in the police force, brings to mind the Afrikaans saying, "*om vir wolf skaapwagter te maak".*

[43] The employee committed serious misconduct whilst he was on duty as a police officer. On 5 November 2008 he was on his way from George to Oudtshoorn, ironically enough to chair a disciplinary hearing. En route, he stopped at the Game store in York Street in George. He entered the store where he was observed and kept under surveillance by the floor manager, Tanderine Moonsamy Pillay. Pillay followed him because one of Game's senior security officers had told Pillay that he had seen the employee (Lamastra) in the store previously. When he had gone to the spot where Lamastra had been standing, he had found empty packages there.

[44] On the day in question, Pillay saw Lamastra walking to the sports department and heading straight for the darts on the shelves. He unpacked several darts and then walked about the sports department with a set of darts in his hand. He then walked to the section in which the fishing rods are found and Pillay lost sight of him. When Pillay saw Lamastra again, he did not have the set of darts in his hand. When Lamastra reached the front door of the store, Pillay approached him and asked to speak to him in his office. Lamastra refused to accompany Pillay, and instead attempted to leave the store. Pillay attempted to stop him, whereupon Lamastra tried to flee. Two security officers assisted Pillay in preventing Lamastra from fleeing. During the struggle to prevent him from fleeing, a set of darts fell out of his coat pocket. He was then escorted to one of the offices in the store.

[45] In the office, Pillay found a further three sets of darts on Lamastra. One set was hidden on the left side of his leg and two sets were found in the back of his trousers. Whilst in the company of Pillay and the senior security officer, Andrews, Lamastra asked Andrews: "Is daar nie 'n manier hoe ons die ding kan *uitsort* nie?" Lamastra told Andrews that he did not want to lose his job. The only inference that can be drawn from this interchange is that Lamastra was attempting to defeat the ends of justice.

[46] The chairperson quite correctly characterised the misconduct as serious and as containing an element of dishonesty. Inexplicably, though, the chairperson found that the relationship of trust between Lamastra and his employer had not broken down.

[47] It is so, as Lamastra contended at the disciplinary hearing, that he had not stolen from his employer. Sut he is a police officer who has a duty of honesty and integrity, not only to his employer, but to the general public. He committed himself to a code of conduct in which the principles of honesty and integrity are highlighted. It is inconceivable that the South African Police Service should be expected to keep in its employ, a senior member who has committed shoplifting.[26]

[48] In the disciplinary enquiry, the witness Denise Beukes testified that it would be extremely difficult to place a person that worked at that level in a position of trust again. She explained that Lamastra was part of middle management, and in a position of authority. Furthermore, when he was caught, he had shown no remorse, but instead tried to “get away with it”. It is also an important factor that he was on duty when he committed the misconduct.

[49] Instead of coming clean, Lamastra advanced a manifestly dishonest defence at the disciplinary enquiry. It is so that he had long service and that the chairperson took this into account as a mitigating factor. However, as the Labour Appeal Court pointed out in *De Beers Consolidated Mines Ltd v CCMA*[27], long service is not necessarily a guarantee against dismissal. As Conradie JA said[28], "the risk factor is paramount. If, despite the prima facie impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and employee’s lack of commitment to reform, continued employment of the

[26] Lamastra has not been criminally convicted of shoplifting. I use the term, not in its criminal law sense, but in the context of a disciplinary enquiry.

[27] (2000) 21 *ILJ* 1051 (LAC)

[28] At 1059 B-C para [24]

offender will be operationally too risky, he will be dismissed." He also noted that long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. "A senior employee cannot, without fear of dismissal, steal more than a junior employee."

[50] The LAC in *De Beers* also considered the question of remorse. Conradie JA again[29]:

"It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself is broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is deposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great."[30]

[51] Lamastra showed no remorse, either when he was caught or during the disciplinary hearing. In these circumstances, it cannot be expected of the South African Police Service to keep him in its employ.

[52] Given this set of facts, the lenient sanction imposed by the chairperson is so unreasonable that no reasonable decision maker could have come to the same conclusion. I am persuaded that the decision on sanction should be reviewed and set aside.

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[29] At 1059 D-E para [25]

[30] at para [25]

Remit or substitute?

[53] It is trite that the court on review will generally refer a matter back to the administrative functionary for reconsideration, rather than substitute its own decision for that of the functionary.[31] But that is not an inflexible rule. For example, in *Gauteng Gambling Board v Silverstar Development Ltd and others*[32] and cases there cited it was held that, in essence, it is a question of fairness to both sides.[33]

[54] In the present case, I have a full record of the evidence given at the disciplinary enquiry before me. Nothing would be gained by remitting the matter for a re-hearing. Lamastra has been on paid suspension for seven months. A further delay will only entail further unnecessary expenditure by the applicants.

[55] The applicants submitted that I should substitute the finding of the chairperson with a sanction dismissing the second respondent from the first respondent's employe with effect from the date of the first respondent's award imposing the sanction. I am not in a position to decide whether the applicants will or should attempt to recover the salary they have paid to the second respondent since that date. Therefore, I do not express a view on that aspect. I am satisfied, though, that the applicants have made out a case for the relief sought.

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[31] See, *inter alia, Ntshangase (supra)* at para [20].

[32] 2005 (4) SA 67 (SCA) para [40]

[33] See *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA); *Johannesburg City Council v Administrator, Transvaal and ano* 1969 (2) SA 72 (T) 76 D-E; *Ntshangase (supra)* para [22].

COSTS

[56] In the light of my earlier ruling on condonation, the review application was heard on an unopposed basis. No costs order is warranted in the main application. I have already stated my views with regard to costs in the condonation application in paragraph [14] above.

ORDER

[57] I make an order in the following terms:

57.1 The second respondent's application for condonation for the late filing of his answering affidavit and heads of argument is dismissed.

57.2 The first respondent's award dated 1 April 2009 is reviewed and set aside in terms of section 158(1)(g) of the Labour Relations Act.

57.3 The award on sanction is substituted with the following award: "The second respondent (i.e. the employee, Gordon Robert Lamastra) is dismissed with effect from one April 2009".

57.4 There is no order as to costs.

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STEENKAMP J

Date of hearing: 9 November 2010

Date of judgment: **19 November** 2010

For the applicants: Adv E A de Villiers - Jansen

Instructed by: The State Attorney

For the respondent: Attorney C van Eetveldt

Instructed by: Van der Merwe Du Toit Inc