Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: **C231/2020**

In the matter between:

THE DEPARTMENT OF ENVIROMENTAL AFFAIRS, FORESTRY AND FISHERIES Applicant

and

THEMBALETHU VICO First Respondent

ADVOCATE MATTHEWS MOJAPELO *N.O.* Second Respondent

(In his capacity as Chairperson of the Disciplinary Hearing)

Date of Set Down: 28 June 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 20 March 2023.

JUDGMENT

VAN VOORE AJ

Introduction

[1] The Department of Environmental Affairs, Forestry and Fisheries (the applicant) launched an application under section 158(1)(h) of the Labour Relations Act, 1995 (as amended) (the "LRA") to, inter alia, review and set aside the findings of the second respondent. The second respondent was the chairperson of a disciplinary hearing convened by the applicant. The applicant convened a disciplinary hearing into allegations of serious misconduct against Mr Thembalethu Vico, the first respondent. At the relevant time, the first respondent was employed by the applicant as Director within the Chief Directorate: Monitoring, Control and Surveillance.

[2] The disciplinary hearing took place over the period 25 February 2019 to 29 November 2019. The second respondent issued a written ruling dated 10 January 2020. The second respondent found the first respondent not guilty of all the allegations against him. The applicant contends, inter alia, that certain findings of the second respondent are susceptible to review on the basis that the second respondent's findings are not those that a reasonable decision-maker could have arrived at considering the totality of the evidence that served before the disciplinary hearing.

Background

[3] The applicant maintains stores at Paarden Island, Cape Town ("stores"). From time to time the applicant holds dried confiscated abalone in those stores. On occasion the dried abalone is packaged and prepared for public auction. The abalone so packaged and prepared for public auction is of a high quality and fit for human consumption. During the latter half of 2017, the applicant held in its stores dried abalone ready for public auction. The applicant's stores are a secure facility which is locked with keys as well as an alarm code. The keys and the alarm code are held by designated employees of the applicant.

[4] On 8 January 2018 the first respondent accompanied by Ms Siphokazi Ndudane (Ndudane), the applicant's former Deputy Director-General and Ms Nazima Parker (Parker), the applicant's former Acting Chief Director: Financial Management, went to the applicant's stores and released three tonnes of dried abalone worth approximately R7 500 000 (seven million, five hundred thousand rand). The abalone was released to members of Crime Intelligence.

[5] The applicant contends, inter alia, that the release of the dried abalone on 8 January 2018 was wholly irregular, did not comply with its known and documented procedures in relation to the release of dried abalone. In addition, the applicant contends that this conduct by the first respondent, Ndudane and Parker caused it to suffer loss. Insofar as the loss is concerned, it is the applicant's case that dried abalone, properly and carefully packaged and ready for sale at public auction, was released from its stores on 8 January 2018 whereas on 7 February 2018 abalone of poor-quality, smelly, some of it mouldy and rotting was returned to its stores.

[6] The applicant is properly and appropriately concerned with the alleged irregular release of high-quality abalone and the return to its stores of poor-quality abalone. The applicant convened a disciplinary hearing in which the first respondent faced various allegations of serious misconduct. Those allegations concerned, *inter alia*, the first respondent's participation in the release of the abalone, his conduct when abalone was returned, his conduct in relation to verification procedures and a written statement made by the first respondent.

Grounds of Review

[7] The applicant sets out a number of grounds of review. The grounds of review include the following:

7.1 That the second respondent misdirected himself in fact and in law by finding as follows:

> *"I am not persuaded that paragraph 2.9.1 of the policy provides for the exclusives delegated authority on the Director: MCS to handle*

confiscated abalone. My finding is that no such delegation exists."

7.2 The second respondent misdirected himself by ruling that:

"The uncontested evidence is that Mr Vico in participating in the removal of the abalone on 08 January 2018, was acting under the instruction of the Acting Director: General, Ms Ndudane. Again, the evidence is that when the abalone was issued to the Police, both Ms Ndudane and Mr Vico were present at the store. In [sic] seems to me that Ms Ndudane was exercising her powers as the Director General (acting) at the time. Whether she exercised those powers lawfully or unlawfully, it is not a question to be determined by this hearing. All that needs to be said is that the employer's submission that the office of the Director has authority and delegation to the exclusion of the DG is not the correct interpretation and application of the policy referred to."

7.3 The second respondent misdirected himself by ruling (in paragraph 329) that:

"The employee has been charged with fraud, alternatively theft of the abalone. The charge sheet is framed in such a way that the employee should be found to have acted with "common purpose" with Ms Siphokazi Ndudane. It is doubtful whether the doctrine of common purpose is applicable here, because firstly, the employee would not have had the capability of usurping any "delegated powers" in terms of the provisions of Section 79 (3) of the Act mentioned hearing above as she was not the Acting – Director

> *General at the time. Secondly, the employee is the only one facing the hearing in this matter. In other words, there is no evidence presented that there was any wrongdoing by the then Acting Director General in terms of which Mr Vico should be held to have acted in common purpose."*

and:

> *"Acting on the instructions of an Acting DG can hardly be characterised as defrauding the Department that one has authority when one does not."*

7.4 The second respondent misdirected himself by ruling in paragraph 338 as follows:

> *"And secondly, the accounting officer then, Ms Ndudane, was well aware of the incident. The two offices that are supposed to receive a report, the Police and the Accounting Officer, are aware of the removal of abalone. The question is where else, and who else should the removal of abalone be reported."*

7.5 The second respondent erred in fact and in law, by ruling in paragraph 379 that:

> *"The use if the word "involve" is rather unfortunate and it is in my view not assisting the interpretation the employee attempts to give to the statement. I have no reason not to believe him taking into account the language used must have been his second or third language."*

7.6 The second respondent further ruled that:

> *"To hold an employee guilty of making a statement of allegations of wrongdoing against another official, whether true or false, without any investigations, will*

> *have the chilling effect of stifling any form of grievance or whistle blowing. What is the purpose of an investigation? In my view an investigation should be conducted where there are allegations of wrongdoing in order to prove the veracity of those allegations before disciplinary proceedings can be instituted."*

7.7 The second respondent ignored inconsistencies, fabrications of evidence and contradictions.

7.8 More generally the applicant contends that the second respondent's findings are not those that a reasonable decision-maker could have arrived at considering the totality of the evidence that served before the disciplinary hearing.

Condonation Application

[8] The applicant has applied for condonation for the late filing of the review application. The review application was launched after the expiry of six weeks from the date of the second respondent's ruling. The applicant instructed the office of the State Attorney to brief counsel to prepare a review application. A draft application was apparently prepared by 13 February 2020. The record of the proceedings is voluminous, comprising some seven lever arch files. The national lockdown also intervened and this impeded the preparations necessary to launch a review application. In addition, the applicant also had to contend with the merger of the Fisheries Branch into the Department Environmental Affairs. The merger also involved a changing of the guard and this further impacted the preparation and finalisation of the review application. The review application was served on or about 2 July 2020.

[9] The delay in launching the review application is not insignificant. However, the applicant has provided valid reasons for their delay. Further, the matter is clearly one of importance to the applicant and of public importance more generally. On balance, it is in the interests of justice that the late filing of the review application be condoned.

The relevant legal principles

[10] In the matter of Hendricks v Overstrand Municipality & Another (2015) 36 ILJ 163 (LAC) the Court held:

> "*[29] In sum therefore, the Labour Court has the power under s158 (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'."*

[11] A chairperson of a disciplinary hearing is required to assess the evidence and in doing so to resolve disputes of fact. In *Sasol Mining (Pty) Ltd v Nggeleni NO & Others* the Court held:

> "*The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observations on their demeanor. He ought to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis*."

[12] The Court's reasoning in *Sasol Mining* applies with equal force to a chairperson of a disciplinary hearing.

[13] In *Stellenbosch Farmers Winery v Martell et Cie & Others* 2003 (1) SA 11 (SCA) and at paragraph 5 the Court held:

> *"On the central issue as to what the parties actually decided there are 2 irreconcilable versions*

so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend upon a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candor and demeanor in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party

burdened with the onus with proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

Charges Related to Theft and Fraud

[14] The evidence that properly served before the proceedings of the disciplinary hearing included the following:

14.1 Mr Dana (Dana) was employed as the Chief Director responsible for Monitoring Control and Surveillance. The applicant had developed a written policy to deal with the handling of confiscated abalone: Policy on Handling of Confiscated Abalone (the policy). The policy was approved and accepted on 27 November 2009. The policy included provisions on the issuing of confiscated abalone in support of a section 252A of the Criminal Procedure Act, 1997 (the CPA) operation (section 252A operation). Requests that the applicant supports a section 252A operation are dealt with by the applicant's Directorate: Special Investigation Unit. Dana was the head of that unit. Dana and his colleagues are required to consider the request and then to indicate whether they support or do not support the request. Typically, in doing so they would also briefly state their reasons.

14.2 The applicant's employees were bound by the policy. In the handling of confiscated abalone, the applicant's employees were obliged to follow the policy.

14.3 On the morning of 18 December 2017, the first respondent called Dana on his mobile telephone. The first respondent informed Dana of a meeting which was to take place that morning with Crime Intelligence officials who had requested that dried abalone to be released to them. The first respondent also informed Dana that the

Chief Financial Officer and the store's custodian, Mr Laeeq Aspeling (Aspeling), would participate in the meeting.[1]

14.4 The meeting did indeed take place. Dana was introduced to two persons as officers from Crime Intelligence.[2] The officers from Crime Intelligence requested the release of three tonnes of abalone to them. The officers had in their possession an application for an undercover operation in terms of section 252A of the CPA.[3]

14.5 During the 18 December 2017 meeting Dana and his colleagues raised a number of issues with the request that the applicant releases three tonnes of abalone to Crime Intelligence. The issues included matters which required the Crime Intelligence officers to return to the Department Public Prosecutions (DPP) and have the issues or concerns clarified or resolved, the absence in the documents of registration of the abalone with the South African Police Services ("SAPS") in their register for control purposes and for trial purposes and further that the project plan stated that the three tonnes of abalone be issued directly to "the source and the money paid into the source's business account, which was and is not the practice".[4] A further concern was that the project plan did not require that Fisheries Management Branch officials who were going to issue the three tonnes be present to make the necessary entry or recordings and to issue the relevant documentation including permits and transport permits.[5]

14.6 Dana required that the Crime Intelligence officials formally submit the application with his directorate. The officials did so on the same day.

14.7 After the meeting with the Crime Intelligence officers on 18 December 2017 and on the Thursday before Dana was due to go on leave, he was telephoned by one of the Crime Intelligence officers.

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[1] Transcript, Page 92, lines 10 – 25; Page 93, lines 1 - 4

[2] Transcript, Page 93, lines 20 - 24

[3] Transcript, Page 94, lines 15 – 25; Page 95, lines 20 - 25

[4] Transcript, Page 101, lines 1 - 15

[5] Transcript, Page 102, lines 4 - 24

The officer enquired about progress with the request for the release of the abalone and Dana advised the officer that the progress depended on Crime Intelligence going to the DPP and returning to the applicant with a revised application.[6] By 22 December 2017 Crime Intelligence had not returned to the applicant with a further and revised application for the release of abalone. Dana went on leave.

14.8 By 22 December 2017 and after considering the request for the release of three tonnes of abalone, the applicant's records indicated in writing that it did not support the request. The forms indicating that they did not support the request included the following entries:

> *"Application not supported*
>
> *subject to Crime Intelligence: (1) obtaining authorization giving DAFF officials indemnity from Prosecution in the event they have to issue export as well as transport permits, entry into DAFF IT registers showing that this is a legal transaction whilst not.*
>
> *(2) that there is a possibility of the money paid for this abalone to be lost if there is a deviation from SAPS' processes and money paid into the source's account and not SAPS registered account.*[7]
>
> *Comments*
>
> 1. *We do not have sufficient stock available following discussions*
> 2. *We require assurance regarding potential losses and proper implementation plan to avert said losses."*[8]

14.9 The request for the release of the abalone was not supported by Dana's office.

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[6] Transcript, Page 104, lines 11 – 25; Page 105, lines 1 - 4

[7] Transcript, Page 105, lines 24 – 25; Page 106, lines 1 - 15

[8] Bundle of Documents, Page 117

14.10 On 8 January 2018 the first respondent called Bernard Liedemann (Liedemann) to his office. Liedemann is a Deputy Director within the Directorate Monitoring and Surveillance. The first respondent and Liedemann_discussed the application or request that the applicant supports the section 252A operation. Liedemann explained to the first respondent that Dana did not support the application and that he too was in full agreement with Dana.

14.11 On 8 January 2018 the first respondent accompanied by Ndudane and Parker went to the applicant's stores and released three tonnes of abalone with an estimated value of some R7 500 000.00 (seven and a half million rands) to officers from Crime Intelligence.

14.12 Prior to the release of the three tonnes of abalone on 8 January 2018 there was no document which recorded that the applicant had approved the release of the abalone. The release of the three tonnes of abalone on 8 January 2018 was not recorded in any official document of the applicant.[9]

14.13 During mid-November 2017 officers from Crime Intelligence approached the first respondent with a request for the release of abalone. The first respondent indicated in writing in a letter dated 15 November 2017 that he would support the operation.[10]

14.14 The first respondent drafted a document purporting to be:

> *"CONFIRMATION OF AN UNDERTAKING TO ENSURE THAT THE MONEY OF 3 TONS (OR PART THEREOF) WILL BE PAID INTO THE MARINE LIVING RESOURCE FUND OF THE DEPARTMENT OF AGRICULTURE FORESTRY & FISHERIES TO CONFIRM THE RECEIPT OF 3 TONS OF DRIED ABALONE REF S26/71/2 (TUO 378/11/2017)".*

[9] Bundle B, Page 109; Transcript, Page 1548, lines 3 – 25 and Page 1549, lines 1 - 9

[10] Bundle B, pages 117A and 117B

14.15 This document was purportedly an undertaking given by Crime Intelligence officers to the applicant. That document was dated 8 January 2018.

14.16 The purported undertaking dated 8 January 2018 was not an official document of the applicant.

14.17 The first respondent's engagement with Crime Intelligence officers during mid-November 2017 was not shared with Dana at the time. The so-called 'confirmation of undertaking' dated 8 January 2018 was not shared with Dana and his colleagues in the unit at the time.

14.18 On 7 February 2018 abalone of poor quality, some of it smelly, mouldy and rotting, was returned to the applicant's stores.

14.19 In correspondence dated 4 June 2018 the applicant's Director-General gave the first respondent notice of his intention to place him on precautionary suspension. The notice of intention to place the first respondent on precautionary suspension related to his involvement in the release of the abalone and the subsequent return of abalone to the stores. In the letter dated 4 June 2018 the Director-General takes the view that the removal of the abalone was '*suspicious*' and that the attempt to return it to the stores was '*secret*'. The first respondent was given an opportunity to respond in writing as to why he should not be placed on precautionary suspension.

14.20 The first respondent's written response to the letter from the applicant's Director-General is dated 13 June 2018.

[15] The evidence as summarised above was not the subject of any serious dispute.

[16] In the first respondent's letter to the applicant's Director-General dated 13 June 2018 he does not state that in recommending the release of the abalone he was acting on the instructions or authority of Ndudane. In his 13 June 2018 letter the first respondent contends that he had the authority to recommend support of the section 252A operation in his capacity as the Acting Chief Director: Monitoring Control and Surveillance.

[17] However, during the disciplinary hearing the first respondent testified that he was acting under the instructions of Ndudane.[11] It was the first respondent's version in the disciplinary hearing that Ndudane instructed him in a meeting that abalone needed to be issued to the police. This version formed no part of the first respondent's letter to the applicant's Director-General dated 13 June 2018.

[18] The evidence that served before the disciplinary hearing also dealt with the issue as to whether there were any valid documents which approved the issuing of abalone on 8 January 2018. In summary, the evidence that served before the disciplinary hearing included that prior to the release of the three tonnes of abalone on 8 January 2018 there was no document which recorded that the applicant had approved the release of the three tonnes of abalone. [12]

[19] In the disciplinary hearing it was the applicant's case that there was no documentation which recorded that it had approved the release of three tonnes of abalone. This issue was not in serious dispute. In fact, the transcript on this score further records the following:

> *"CHAIRPERSON: Look, let me just interject here. The employer's version is that this is an application and they call witnesses to say it's an application and you challenged it during cross-examination. But let me just go back to Mr Mnisi. Mr Mnisi, according to the evidence it is common course that the issuing of an application in terms of this internal procedure of 110 and 111 was refused by the Department. Is it necessary to go over it again?"*[13]

[20] The evidence that served before the disciplinary hearing did indeed establish that there was a request (an application) to the applicant for the release of three tonnes of abalone. That request was considered by Dana and his colleagues in the applicant's Directorate: Special Investigation Unit

[11] Transcript, Page 104, Lines 7 – 25, Page 105 and Page 106, Lines 1 - 6

[12] Transcript, Page 1070, Lines 12 – 25, Pages 1708 – 1712, Lines 1 – 9

[13] Transcript, Page 1729, lines 7 - 14

in accordance with the applicant's ordinary procedures. The outcome of a consideration of the request in accordance with the applicant's ordinary internal procedures was that the release of the three tonnes of abalone was not approved. This was documented in accordance with the applicant's ordinary procedures.[14]

[21] In the face of the established facts that served before the disciplinary hearing the first respondent sought to defend and explain his conduct. That conduct included engagements with Crime Intelligence officers during mid-November 2017, dealing with a request for the release of abalone outside of the applicant's ordinary and documented procedures, attending at the applicant's stores on 8 January 2018 and releasing or being party to the release of three tonnes of abalone absent any approval by the applicant and absent any official document recording the release of the abalone.

[22] The first respondent's attempts to explain his conduct included the alleged delegated authority of the Director-General or Acting Director-General and his own alleged authority. However, those contentions as to the delegated authority ought not reasonably have been found to assist the first respondent. The applicant has in place a documented policy which deals with, amongst other things, the handling of confiscated abalone. All employees including the first respondent and the Director-General or Acting Director-General from time to time are bound by the policy. Even if it is to be accepted that Dana's unit did not have the exclusive authority to consider and decide on requests that the applicant supports a section 252A operation by releasing confiscated abalone, persons more senior to Dana would have to follow a documented process including giving reasons at the time of making their decisions.

[23] The first respondent contended that Dana did not have the delegation or the delegated authority in respect of requests relating to a section 252A operation and that that delegated authority is with persons senior to Dana and in particular the Director-General or Acting Director-General from time to time. It was the first respondent's version that because the delegated authority is allegedly with persons senior to Dana, those persons had the

[14] Bundle of Documents, Pages 110 - 111

power to make a decision in respect of a request to support a section 252A operation and to override a decision by Dana and his colleagues to support or not support a request in respect of a section 252A operation. In advancing these contentions as to delegations and authority of employees more senior to Dana, the first respondent presented no documentary evidence as to when such senior employees exercised their alleged delegated authority, the considerations that allegedly moved them to exercise the alleged delegated authority, or a record of the fact that such authority was invoked and exercised.

[24] The first respondent's version and contentions as to the exercise of the alleged delegated authority are troubling. If the first respondent's version and contentions are to be accepted, then it would have the result that an employee more senior to Dana and his colleagues in the applicant's Directorate: Special Investigating Unit, and who apparently has the delegated authority, could decide to release confiscated abalone held by the applicant in its stores apparently in support of a section 252A operation, need not do so in writing, need not do so by following an iterative process including providing reasons for releasing the abalone and that confiscated abalone could be released on the basis of their say-so. Such a construction cannot be correct or proper. It could never be seriously contemplated that an appropriately senior official of the applicant could make a decision, let alone one so serious as the release of confiscated abalone worth millions of rands, simply by saying so, without following a documented process and providing reasons. Such a construction would permit an abuse of power, a lack of transparency and the complete absence of accountability. No reasonable decision-maker could come to the conclusion that a Director-General or Acting Director-General of the applicant or indeed the applicant's Director within the Chief Directorate: Monitoring Control and Surveillance, from time to time, could lawfully act in the manner contended for by the first respondent.

[25] The first respondent's version and contentions as to delegated authority are manifestly inconsistent with the documentary evidence and the proper oral evidence that served before the disciplinary hearing and manifestly inconsistent with the proper exercise of power by senior officials. In

assessing the evidence before the disciplinary hearing and in light of the established facts, the second respondent ought to have rejected as implausible and improbable the first respondent's version that Ndudane had exercised delegated authority and that the abalone was lawfully released. The second respondent had a proper basis to reject this version.

[26] The fact of the first respondent's engagement with Crime Intelligence officers during mid-November 2017 was not shared with Dana and his colleagues in his unit at the time. Requests that the applicant supports a section 252A operation are dealt with by the applicant's Directorate: Special Investigation Unit. In the evidence that served before the disciplinary hearing the first respondent did not provide any good and valid reasons for not referring the mid-2017 request to Dana and his unit.

[27] The evidence before the disciplinary hearing established that the purported 'confirmation of undertaking' dated 8 January 2018 had no status and is not an official document of the applicant. The first respondent's conduct in preparing the so-called 'confirmation of undertaking' dated 8 January 2018 and the circumstances in which that document was prepared ought to have raised red flags with a chairperson of a disciplinary hearing.

[28] On balance, the letter dated 15 November 2017 and, maybe more importantly, the purported confirmation of undertaking dated 8 January 2018 created by the first respondent and the first respondent's version as to alleged delegated authority of officials more senior to Dana including the alleged oral instruction from Ndudane, ought reasonably to have been determined as being part of an attempt to regularise the wholly irregular release of the three tonnes of abalone.

[29] In evidence during the disciplinary hearing the first respondent conceded that there was no document or other official record of the applicant that approved or authorised the release of three tonnes of abalone from its stores. The reasonable inference is that when the first respondent gave his evidence, he knew that there was no document recording that the applicant approved the release of the 3 tonnes of abalone on 8 January 2018 and that the 'confirmation of undertaking' dated 8 January 2018 drafted by him and apparently signed by Crime Intelligence officers is not such an official

approval of the applicant for the release of the 3 tonnes of abalone. This approach by the first respondent ought to have been cause for serious concern on the part of the second respondent.

[30] The evidence that served before the proceedings of the disciplinary hearing establishes that the first respondent presented varying and indeed contradictory versions. The first respondent contends that he had the authority. The first respondent also contends that he recommended that the operation under section 252A of the CPA be supported and that the abalone be released solely on the basis that the operation was approved by the DPP. He also contends that he acted on the instructions of Ndudane. These claims by the first respondent are contradictory.

[31] The first respondent's version as to his conduct in the release of the abalone was an evolving one. The first respondent's version as to delegated authority being exercised by persons more senior to Dana ought properly to have been assessed as being grounded in self-interest.

[32] The second respondent's finding does not make any proper attempt to resolve the varying and contradictory versions of the first respondent. Further the second respondent's findings do not reflect an assessment as to the probability or more properly improbability of the first respondent's version as to delegated authority, the alleged instruction of Ndudane, and the so-called 'confirmation of undertaking' dated 8 January 2018.

[33] In addition, second respondent's finding that that uncontested evidence was that the first respondent was acting on the instruction of Ndudane is not supported by the facts that served before the disciplinary hearing. The first respondent's version that he was acting on the instructions of Ndudane was much contested. Further, that version of the first respondent is at odds with the documentary evidence as to the release of abalone and the oral evidence of the applicant. On the evidence before the disciplinary hearing there were good grounds to prefer, as more probable and indeed plausible the version of the applicant's witnesses on this score. In view of the evidence that served before the disciplinary hearing and the established facts, the version that abalone could lawfully be released on an oral

instruction from Ndudane ought to have been regarded as implausible and improbable.

[34] The proper evidence that served before the disciplinary hearing includes that in releasing the abalone, the first respondent did not act alone. Ndudane and Parker were present on 8 January 2018 when the abalone was released. The evidence further established that Parker, in the run up to 8 January 2018, was also working with the first respondent. The evidence established that the first respondent, Ndudane and Parker played a significant role in the release of the abalone on 8 January 2018. In doing so, they acted in breach of the applicant's known procedures and its policy on the handling of confiscated abalone. The fact that the first respondent "*is the only one facing the hearing in this matter*"[15] is immaterial to the issue as to whether the first respondent acted with "*common purpose*" with Ndudane. The second respondent's reasoning that *"it is doubtful whether the doctrine of common purpose is applicable here because, firstly, the employee would not have had the capability of usurping any "delegated powers in terms of the provision of section 79(3) of the act… as he was not the Acting Director-General at the time*"[16] is a misdirection. The first respondent's position in the hierarchy of the applicant's employees is not relevant to the issue of whether he acted together with Ndudane and Parker and in common purpose.

[35] The second respondent failed to apply the ordinary principles of our law in resolving factual disputes. He did not properly reflect on the credibility of versions, in particular the versions of the first respondent as a witness. In the result, material facts as to the applicant's process in dealing with requests for the release of abalone were disregarded or given insufficient weight.

[36] The second respondent's findings are not grounded in the evidence that properly served before the disciplinary hearing.

[37] The second respondent's finding is not rationally connected to the facts properly established in the evidence that served before the disciplinary

[15] Second respondent's finding, paragraph 329

[16] Second respondent's finding, paragraph 329

hearing. In the circumstances, the reasoning and findings of the second respondent fall to be reviewed and set aside.

Statement into Court

[38] The first respondent together with Ndudane and Parker prepared a document which was submitted to the Western Cape High Court[17]. It is not in dispute that the document was prepared by the first respondent, Ndudane and Parker. It is not in dispute that they submitted the document to the Western Cape High Court. The document includes the following paragraph:

> *"It is our belief that we are dealing with the criminal syndicates who involve the first respondent (Mr M N Mlenana who is the Director General of DAF), the lawyers he appointed through the state attorneys and some other people."*

[39] One of the charges against the first respondent concerned his participation in making a statement into Court. In this regard it was alleged against the first respondent, under charge fourteen, that he had conducted himself in an improper, disgraceful and unacceptable manner while on duty on or about 25 February 2019 in that he:

> *"Wilfully or in a gross negligent manner made or participated in making a statement filed at the Western Cape High Court in which the following was stated:*
>
> > *"it is our belief that we are dealing with the criminal syndicates who involve the first respondents (Mr NM Mlengana who is the Director General of DAFF), the lawyers he appointed through the state attorneys and some other people".*

[17] Transcript, Page 1889, lines 5 – 9

You very well knew or reasonably ought to have know that the aforementioned statement is improper, disgraceful and unacceptable."

[40] The evidence that properly served before the disciplinary hearing included the following:

39.1 The applicant initiated disciplinary action against the first respondent and others.

39.2 An application was apparently launched to halt the disciplinary action. Subsequently the first respondent, Ndudane and Parker were informed that the application to halt the disciplinary action was withdrawn.

39.3 The disciplinary action against the first respondent, Ndudane and Parker was set to continue.

[41] The content of the 25 February 2019 statement that the applicant finds objectionable is indeed worrisome. It is cause for very serious concern. The statement claims the existence of criminal syndicates who involved the applicant's Director-General and lawyers he appointed. A reasonable plain reading of the statement is that the applicant's Director-General and lawyers he appointed are involved with criminal syndicates. The statement is broad and sweeping. The statement makes very serious and damning allegations in relation to the applicant's Director-General and others.

[42] The second respondent's reasoning in relation to the allegations of serious misconduct arising from the statement into Court includes that a finding of guilty "*To hold an employee guilty of making a statement of allegations of wrongdoing against another official, whether true or false, without any investigations, will have the chilling effect of stifling any form of grievance or whistleblowing".* It appears that in the second respondent's assessment the first respondent in making the statement to Court was acting as a whistle-blower. If the second respondent took the view that the first respondent was acting as a whistle-blower then the ordinary principles of our law in relation to whistle-blowing become relevant. Those principles include the

requirement of good faith.[18] In relation to whistle-blowing good faith is a requirement for any disclosure made to the employer, a member of Cabinet, to the Public Protector and the Auditor General and any other body[19]. Whilst it is so that disclosures do not have to be "*substantially true*"[20], an employee must nevertheless have "*reason to believe*" that the information "*shows or tends to show*" impropriety. The reasonableness of an employee's belief depends, *inter alia*, on the volume and quality of the information available to the employee at the time when the disclosure was made.[21]

[43] In the matter of *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC) at 1678* the Court held:

> *"If the primary or exclusive purpose of reporting is to embarrass or harass the employer the reasonableness of the employee's belief is questionable. Thus, malcontents and employees who slander the employer without foundation, or disagree on the way the organization is managed, do not enjoy whistleblower protection".*

[44] Whether a belief as to impropriety is reasonably held is objectively determinable and is a finding of fact. If the allegations have no foundation in fact, then the employee could not reasonably have held the belief as to impropriety or wrongdoing. If an employee with ulterior motive makes statements without any factual foundation, then such an employee is not acting as a "whistleblower".

[45] During the proceedings of the disciplinary hearing, the first respondent did not give any evidence and certainly not any factual evidence in support of the serious and damning allegations he made in relation to the applicant's Director-General and others.

[18] Section 6 to 9 of the Protected Disclosure Act, 26 of 2000

[19] Section 6 to 9 of the Protected Disclosure Act, 26 of 2000

[20] Tshishonga v Minister of Justice & Constitutional Development & Another (2007) 28 ILJ 195 at paragraph 186

[21] H & M Ltd (2005) 26 ILJ 1737 (CCMA) at 1040

[46] The context in which the statement was made is significant. The statement into Court was prepared and submitted as part of an attempt by the first respondent and others to prevent disciplinary action being taken against them. Properly assessed, the evidence before the disciplinary hearing discloses that the first respondent had an ulterior motive in making serious claims against the applicant's Director-General. The first respondent did not provide the disciplinary proceedings with any proper basis to conclude that he, objectively speaking, reasonably held the view that there were criminal syndicates involving the first applicant's Director-General. On balance, assessed in its proper context, the first respondent's suggestion that his allegations against the applicant's Director-General required an investigation, was part of an attempt by the first respondent to avoid being held accountable. It cannot reasonably be required of the applicant to investigate and pursue spurious and unfounded claims. There is no proper evidentiary basis which would indicate that the first respondent in making the very serious claims that he did was acting as a whistle-blower. The first respondent's claims amount to no more than serious allegations entirely unsupported by facts. During the course of the disciplinary hearing the first respondent conceded that he did not report his alleged concerns in relation to the applicant's Director-General to the authorities.

[47] On the basis of the evidence that served before the proceedings of the disciplinary hearing, a chairperson could reasonably conclude that the statement was made without any factual foundation and with ulterior motive. The evidence does not provide a basis for a finding that first respondent was acting as a whistle-blower. Accordingly, the second respondent's reasoning that a finding of guilty "*will have the chilling effect of stifling any form of grievance or whistle blowing*" is a misdirection.

[48] In assessing whether or not the first respondent was guilty of the serious misconduct alleged against him, a chairperson of a disciplinary hearing may not disregard the evidence that properly served before the hearing and must give that evidence its proper weight. As against that evidence that served before the disciplinary hearing the first respondent contended that he did not mean to say that the applicant's Director-General was part of a

criminal syndicate[22] and that the criminal syndicates were providing the applicant's Director General "*wrong information*" and "*by so doing involving the DG, Mr Mhlengana. And who in turn gave also that information to the lawyers, you know, that he appointed.*"[23]

[49] During his evidence in the disciplinary hearing the first respondent attempted to explain away the more pernicious elements of the statement by claiming that "*linguistically, I am limited.*" However, in view of the established facts, the first respondent's purpose in making the statement and the context, this attempt by the first respondent to avoid the statement being given its ordinary meaning could and should properly have been characterised as little more than a transparent and opportunistic attempt to avoid accountability.

[50] On the evidence before the disciplinary hearing, the fact that the first respondent had in part deployed an evolving version and put forward contradictory versions, the second respondent had proper grounds to treat the first respondent's attempts to explain away the ordinary meaning of the statement with appropriate circumspection and to reject it. The second respondent did not properly reflect on the credibility of the first respondent's version.

[51] A chairperson of a disciplinary hearing is required to assess the evidence. A proper assessment consistent with the known principles of our law could not reasonably yield the outcome that the first respondent was acting as a whistle-blower. Further an assessment consistent with the ordinary principles of our law could not reasonably yield the outcome that a chairperson of a disciplinary hearing could attribute to the statement a meaning other than its plain and ordinary meaning. In the circumstances, the approach adopted by the second respondent in assessing the evidence was not consistent with the ordinary principles of our law and his reasoning and finding on the serious allegations in relation to the statement into Court are not rationally connected to the evidence that served before the

[22] Transcript, Page 1897, lines 22 – 25, Page 1893, lines 1 - 21

[23] Transcript, Page 1645, lines 15 - 25

disciplinary hearing. Accordingly, the second respondent's reasoning and findings fall to be reviewed and set aside.

[52] In his findings as analysed above, the second respondent failed to apply the ordinary principles of our law in resolving factual disputes. He did not properly reflect on the credibility of versions, in particular the versions of the first respondent as a witness. This failure amounts to a gross irregularity in the conduct of the proceedings of the disciplinary hearing. The findings in relation to the charges of fraud and theft and the statement into Court would have been different had the second respondent applied the ordinary principles of our law in assessing the evidence that served before the disciplinary hearing. In the result the second respondent's reasoning and findings are reviewable.

[53] Given the assessment of the second respondent's conduct in assessing the evidence that served before the disciplinary hearing it is not necessary to delve into each and every element of the findings in relation to the other charges. The import of the assessment as to the gross irregularity of the first respondent in assessing the evidence has the inevitable consequence that the second respondent's findings in relation to the other charges, those beyond theft and fraud and the statement into Court, are impugned. In effect the integrity of the proceedings of the disciplinary hearing was compromised.

[54] In the circumstances I make the following order:

Order

1. The application for condonation of the late launching of the review application is granted.

2. The decision of the Second Respondent handed down on 20 January 2020 is reviewed and set aside;

3. Remitting the disciplinary proceedings against the First Respondent to the Applicant to proceed *de novo* before another chairperson who shall be permitted to rely on the record of evidence before the Second

Respondent, together with any additional evidence adduced by the parties.

4. There is no order as to costs.

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VAN VOORE AJ
ACTING JUDGE OF THE LABOUR COURT

Representatives

For the Applicant	J Mnisi Instructed by State Attorney, Pretoria
For the First Respondent	B Aarninkof from Aarninkof Attorneys