THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2395 / 14

In the matter between:

THE SOUTH AFRICAN POLICE SERVICES **First Applicant**

THE NATIONAL COMMISSIONER OF POLICE **Second Applicant**

and

MAJOR GENERAL SESWIKE N.O. **First Respondent**

BRIGADIER V NDEBELE **Second Respondent**

Heard: **15 September 2016**

Delivered: **6 April 2017**

Summary: Disciplinary proceedings by State as employer – review of decision of disciplinary hearing chairperson – Section 158(1)(h) of LRA considered – principles applicable to such reviews considered

Review of disciplinary proceedings – findings of chairperson considered – finding irrational and contrary to principle of legality – finding set aside and replaced with finding of guilty on charges

Review of disciplinary proceedings – once employee guilty sanction must be considered – impossible to decide sanction on available material – matter remitted back to disciplinary hearing for determination of sanction

Misconduct – inappropriate, unprofessional and dishonest conduct – principles considered – evaluation of evidence – conduct of employee tantamount such misconduct – misconduct committed

Suspension – whether suspension lawful – principles considered – suspension lawful

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The current application is an application by the applicants in terms of Section 158(1)(h) of the Labour Relations Act[1] ('the LRA') to review and set aside a finding by first respondent in his capacity as chairperson of the disciplinary proceedings instituted against the second respondent. The second applicant is the responsible functionary for the South African Police Services, being the public service department in which the second respondent is employed. For purposes of convenience, when I refer to 'the applicant' in this judgment it must be regarded that I am referring to the South African Police Services, the employer of the second respondent.

[2] The problem I have with these kind of applications is that it in essence turns the Labour Court into some kind of appeals body where it comes to disciplinary proceedings conducted against officers of the applicant. This places an undue burden on the already stretched resources of the Labour Court, and state departments such as the applicant should rather ensure that officials tasked to preside over disciplinary hearings possess the necessary competence to discharge their duties properly, instead of using this Court as some kind of a back up plan.

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[1] Act 66 of 1995.

[3] The above being said, this matter arose from alleged misconduct committed by the second respondent relating to and in the course of an interview process convened by the applicant, with the view of appointing entry level constables from reservists of the applicant. The first respondent was the presiding officer of the disciplinary hearing convened to decide the misconduct charges brought against the second respondent. The first respondent, in a written finding handed down on 29 October 2014, acquitted the second respondent of all the misconduct charges against her. The applicant, being dissatisfied with this finding, then brought the current review application on 19 November 2014. Applying the 6(six) weeks' time limit in terms of Section 145[2] of the LRA, this review application has been timeously brought, and is properly before this Court.

[4] The second respondent was suspended 25 November 2014, pending the finalization of the review application brought by the applicant. The second respondent challenged such suspension, contending it was unlawful, in a separate application brought under case number J 1553 / 15 on 3 August 2015. This application by the second respondent came before Van Niekerk J on 10 June 2015, who made an order to the effect that this application must be considered along with the review application in these proceedings, on 15 September 2016. I will therefore also decide this application, in this judgment.

[5] Where it comes to both the applications, the factual circumstances do overlap. I will accordingly set out a single set of background facts, applicable to both the review application by the applicant, and the suspension challenge by the second respondent.

The relevant background

[6] The second respondent is a senior and high ranking officer in the employ of the applicant. In this particular instance, she had been specifically tasked and appointed to chair the interview panel which was required to interview, evaluate and then ultimately appoint entry level constables in the applicant, from the ranks of reservists.

[2] Section 145(1)(b).

[7] Where it comes to the appointment of employees in the applicant, this is subject to specific regulations, found in National Instruction 6 / 2005 ('the Instruction'). A conspectus of the Instruction shows that the interview panel is critical and pivotal the appointment process.

[8] As appointed chairperson, the second respondent is the most important member of the panel and must guide its activities. It is also the direct duty of the chairperson, in terms of clause 7(3) of the Instruction, to ensure that proper records are kept of all the proceedings, including the interviews and any other discussions the panel may have had. The Instruction allows for a secretary to be appointed to assist with this function (clause 6(6)). In terms of clause 8(4) of the Instruction, all these records kept of the proceedings must be retained by the relevant division of the applicant for at least three years.

[9] The interview panel is responsible to interview all candidates on a shortlist, which interviews are done in line with the guidelines as set out in clause 10 of the Instruction. Following the completion of interviews and evaluation of all the candidates interviewed, the panel makes a recommendation as to their choice for appointment to the past (clause 12(1)). All these recommendations must then be recorded in writing and signed off by the chairperson (clause 12(4)). It is also the chairperson that must submit the recommendations to the relevant commissioner in the applicant for formal appointment (clause 13(1)).

[10] The applicant's unhappiness with the second respondent stemmed from her conduct in the course of being the appointed chairperson of the interview panel and process referred to above.

[11] A total of 43 candidates had to be interviewed, in the current process. The list of candidates to be interviewed was circulated on 12 February 2013 to all the parties involved on the panel, which included an independent observer. The interviews were to be conducted at the SAPS in Actonville.

[12] Colonel F J Jonck ('Jonck') was the station commander at SAPS Actonville and one of the panel members of the interview panel chaired by the second respondent. Jonck was the one who made the actual arrangements for the conducting of the interviews and the attendance of the candidates at the

interviews. Jonck specifically arranged with the second respondent to attend at the boardroom, SAPS Actonville, on 14 February 2013 at 08h00, to commence conducting the interviews. The same date and time was arranged with the other panel members.

[13] On 14 February 2013 and by 08h00, all the panel members and most of the candidates were present, but the second respondent did not arrive. Jonck telephoned the second respondent and informed her that the interviews were ready to start and asked where she was. The second respondent informed Jonck that she was still 'busy' at the provincial office and would be 'coming soon'. The interviews could not take place without the attendance of the second respondent as chairperson of the panel. When the second respondent had not arrived by 10h30, Jonck called her again, and she once again said she was coming but was still busy at the provincial office. When the second respondent had still not arrived by 16h30, Jonck called her to ask if he could excuse the panel members and the candidates until the next day, 15 February 2013, which was the last day for the interviews to be completed. The second respondent agreed to this, and the candidates and panel members were excused. Jonck also informed the panel members and candidates to return the following day, 15 February 2013, at 08h00. The second respondent confirmed to Jonck that she would be there on 15 February 2013.

[14] Then on the following day, 15 February 2013, all the panel members and the candidates were again in attendance and the interview process was ready to proceed at about 08h30. The second respondent again was not present. Jonck telephoned her again, and once again she informed him that she would be coming. The second respondent only arrived at about 15h30, and interviews started at about 16h00. Because of the late arrival of the second respondent, the interviews continued into 16 February 2013, concluding only at about 02h00 that early morning.

[15] Added to the above, the provincial commissioner, Major General T M Maloka, had instructed on 6 February 2013 that the whole interview process had to be completed by 15 February 2013, and this deadline was clearly not met.

[16] In the course of the interview process, and in line with the instruction, all the interviewed candidates were scored by each member of the panel. Following

the completion of the interview process, the panel then had to make the recommendations for appointment in terms of the instruction. A total of 11 candidates had to be recommended for 11 posts. It was agreed by the panel that the 11 candidates with the highest consolidated scores would be recommended. The appointed secretary, Shireen Alwar ('Alwar'), would prepare the recommendation list, and that list would then be submitted to the second respondent for signature in terms of the instruction.

[17] This list was prepared by Alwar on 18 February 2013, and handed to another panel member, Captain J Mokheseng ('Mokheseng') for presentation to the second respondent for signature. Mokheseng went to the second respondent on the same day to procure her signature on the list, but she refused to sign the list because she said there was a 'mistake' on the list. The second respondent said that this mistake was that one of the interviewed candidates, B C Bocibo ('Bocibo'), who had 'done well', was not on the list. Mokhaseng then went away, and amended the list himself. He removed the name of a recommended candidate, C M T Mnyandu, from the list and replacing that name with that of Bocibo. It may be added that Bocibo was from Benoni, where the second respondent was stationed, whilst Mnyandu was not. The second respondent was presented with this amended list by Mokheseng on 19 February 2013, and then signed this amended list.

[18] It appears from the evidence that a number of investigations were conducted into the above events, after it came to light, and reports and recommendations were filed. Ultimately, and on 23 July 2014, Major General C Hendricks, the head of legal services for Gauteng, recommended that disciplinary proceedings be instituted against the second respondent.

[19] On 31 July 2014, the second respondent was then served with a notice of intention to suspend her in terms of Regulation 13(2) of the SAPS Regulations, as a precautionary measure pending the contemplated disciplinary proceedings. The second respondent was informed of the allegations against her. The second respondent was called on to make submissions as to why she should not be so suspended. On 4 August 2014, and through her trade union POPCRU, the second respondent then indeed made written submissions as to why she should not be suspended. In these

submissions, the second respondent addressed the merits of the allegations against her.

[20] After due consideration of the second respondent's submissions, the Gauteng provincial commissioner, Lieutenant General J L Mothiba, decided to nonetheless suspend the second respondent without remuneration in terms of Regulation 13(2). The second respondent was informed in writing of this suspension on 6 August 2014, as well as the reasons for the suspension.

[21] Following on her suspension as set out above, the applicant then literally threw the book at the second respondent. A total of 10(ten) charges were brought against her by way of a notice to attend a disciplinary hearing served on her on 12 August 2014. Much of the charges are simply repetitions of one another, just with some changes in wording and description. Cut down to its bare essentials, all the individual charges against the second respondent can be consolidated into three principal charges. The first of these principal charges was unprofessional and disrespectful conduct on the part of the second respondent with regard to her failing to attend to the interview process scheduled to take place on 14 February, and then 15 February 2013, which caused embarrassment to the applicant and culminated in a waste of time and resources. The second principal charge is in essence one of dishonesty, unacceptable behaviour and breach of her duties under the Instruction, relating to the alterations which took place to the final candidate list on 18 and 19 February 2013, and the presenting of what was in effect an irregular list to the commissioner for approval. Finally, the third principal charge was one of insubordination in failing to conclude the interviews by 15 February 2013 as instructed.

[22] The second respondent sought to explain the charge with regard to her failure to attend the interview process on 14 and 15 February 2013, by saying that she did not attend the interviews because she was looking for the list of names of reservists that qualified to be interviewed from the relevant cluster, and only after she received the list, she started with the interviews on 15 February 2013. As to the other charge relating to the altered list of recommended candidates, the second respondent disputed that she ever gave Captain Mokheseng an instruction to change the list. She stated that only one list was

presented to her, which she signed, and she trusted that the person who presented it to her, would present her with a correct list. On the insubordination charge, the second respondent contended that she did complete the process in time in line with the instruction that had been given.

[23] The disciplinary hearing against the second respondent, on the above charges, then convened on 15 August 2014 before the first respondent as appointed chairperson, and on that date preliminary issues were dealt with. The disciplinary hearing continued on the merits of the matter from 8 to 12 September 2014, and finally concluded on 23 October 2014. Four witnesses testified for the applicant, being Colonel Jonck, Captain Mokheseng, Mr S Naidoo and Alwar, with the second respondent testifying on her own behalf. The disciplinary proceedings were recorded. As stated above, the first respondent acquitted the second respondent on 29 October 2014 of all charges against her, in a written finding.

[24] Having been acquitted, the second respondent reported back at her normal station on 30 October 2014. This invoked the ire of the acting provincial commissioner, Major General T C Mosikili, who believed the second respondent should have reported to his office. Major General Mosikili viewed this as a breach of discipline by the second respondent, as her return to work could only be authorized by his office. In a notice to the second respondent on 31 October 2014, Major General Mosikili informed the second respondent accordingly, and also informed her that the judgment of the second respondent had been sent for legal opinion. The second respondent was also specifically informed that the office of Major General Mosikili would inform her when she could resume her duties.

[25] The second respondent took the matter up with Major General P E Gela, the deputy police commissioner operational services for Gauteng. Major General Gela informed the office of the provincial commissioner that that it could not be seen that the second respondent acted in an undisciplined fashion. Major General Gela held the view that the second respondent's suspension ended with her acquittal, and she was entitled to resume her duties.

[26] Major General Mosikili did not take kindly to the intervention by Major General Gela. In essence, Major General Mosikili stated that he was higher up in the

food chain, and his instructions prevailed. Major General Mosikili stated that only he could issue instructions to the second respondent concerning her official duties. The second respondent was then instructed in writing on 3 November 2014 to vacate her offices in Benoni. The second respondent complied and vacated her office.

[27] The applicant's review application then swiftly followed, as referred to above. Pending the conclusion of this review application, the applicant then again sought to suspend the second respondent. On 17 November 2014, the provincial commissioner, Lieutenant General Mothiba, gave the second respondent written notice that since the review application had now been brought, she had to provide written submissions as to why she should not be further suspended under the 'common law' pending the conclusion of the review application. This suspension would however be on 'full benefits'. The reasons given for this proposed course of action was the seriousness of the allegations against the second respondent, the seniority of her position, and that her presence at work would not be conducive to sound labour relations. The second respondent duly made written representations on 19 November 2014. After considering these representations, and on 25 November 2014, Lieutenant General Mothiba decided to persist with suspending the second respondent, and advised her in writing accordingly. She has been suspended since, but this time on full remuneration.

[28] Only on 3 August 2015, the second respondent then brought the application to declare her suspension to be unlawful, and sought an order that it be uplifted and that she be allowed to resume her normal duties.

[29] I am of the view that the most practicable manner in which to decide both the matters before me is to start with the applicant's review application. The reason for this is that if the applicant's review application is not successful, there would simply be no basis for the second respondent's suspension to persist, and this in itself would lead to her being granted the relief she seeks in her application to have her suspension uplifted. I will commence with deciding the applicant's review application by setting out the applicable review principles.

Review principles

[30] What makes these kind of cases unique is that the State as an employer is in essence seeking to challenge its own conduct, as perpetrated by its own functionaries. The reason why this kind of challenge is a possibility is founded upon a Constitutional imperative. Section 195(1) of the Constitution provides:

> 'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
> *(a)* A high standard of professional ethics must be promoted and maintained. …
> (d) Services must be provided impartially, fairly, equitably and without bias. …
> (g) Public administration must be accountable. …'

In terms of Section 195(2), the above principles apply to all organs of state and in the administration of every sphere of government.

[31] The Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[3] considered the application of Section 195 of the Constitution where it came to the employment relationship between the state as an employer and its employees, but in particular where it came to the conduct of public service functionaries where it came to dealing with *inter alia* misconduct of such employees. The Court held as follows:[4]

> 'Section 195 provides for a number of important values to guide decision makers in the context of public sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in s 195(1)*(f)* and *(g)* and the requirement of a high standard of professional ethics in s 195(1)*(a)*. Read in the light of the founding value of the rule of law in s 1 *(c)* of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a

[3] (2014) 35 ILJ 613 (CC).
[4] Id at para 35.

> decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.'

Therefore, and should it come to the attention of a responsible functionary in the applicant that an irregularity exists in the manner a police officer was dealt with, or not dealt with as should have been the case, in the course of disciplinary proceedings against that police officer, that responsible functionary has a duty to act to remedy the situation. The point is that that which is irregular must be corrected.

[32] In terms of Section 158(1)(h) of the LRA, the Labour Court may: '… review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.' This provision, as read with Section 195 of the Constitution, would then appear to be the proper avenue for a responsible functionary at the applicant to seek to correct an irregularity in the context of internal disciplinary proceedings where its officers are involved.

[33] The Courts have been critical of the application of Section 158(1)(h) as a basis to challenge the findings of internal disciplinary proceedings in the State directly to the Labour Court, by way of a review application. But this criticism was given in a specific context, namely where employees seek to launch such a challenge. The settled position now is that where employees seek to challenge the findings of disciplinary hearing functionaries in the State, they are compelled to use the dispute resolution mechanisms in terms of Chapter VIII of the LRA and cannot rely on Section 158(1)(h). In *Chirwa v Transnet Ltd and Others*[5] the Court said:

> 'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges

[5] (2008) 29 ILJ 73 (CC) at para 41. See also *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 56.

> unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.'

The Labour Appeal Court in *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another*[6] applied the above *dictum* in *Chirwa* as follows:

> 'The supposition that public servants had an extra string to their bow in the form of judicial review of administrative action, ie acts and omissions by the state vis-à-vis public servants, evaporated when the Constitutional Court in Chirwa v Transnet Ltd & others, held that the dismissal of a public servant was not 'an administrative act' as defined in PAJA and therefore not capable of judicial review in terms of that Act. Any uncertainty regarding the interpretation of the Chirwa judgment was removed in the subsequent decision in Gcaba v Minister for Safety & Security & others. The result is that a public servant is confined to the other remedies available to him or her.'

[34] However where it comes to a challenge by the State as an employer, the same position of being confined to the prescribed dispute resolution mechanisms under the LRA cannot apply. The reason for this is simply that the State cannot utilize these mechanisms, where it comes to challenges by the State itself against conduct or actions of its own functionaries, and therefore the State has no recourse to the normal dispute resolution processes under the LRA. For example, there is no provision in Chapter VIII of the LRA that would allow an arbitrator to entertain a dispute in which the State as an employer seeks a finding that the employee be found guilty of misconduct or be dismissed, in circumstances where the employee was acquitted or not dismissed by the functionary assigned to preside over the disciplinary proceedings of such an employee. In short, the applicable dispute resolution mechanisms under the Chapter VIII of the LRA were specifically designed for challenges by employees, and not employers. It would seem that review proceedings under Section 158(1)(h) would be the only provision upon which the State can rely on to seek the kind of correction and redress referred to above.

[6] (2012) 33 ILJ 1822 (LAC) at para 26.

[35] In *Hendricks v Overstrand Municipality and Another*[7] the Labour Appeal Court dealt with the applicability of the dispute resolution system under the LRA to these kind of challenges by the State as an employer, and said:

> 'The underlying guiding rationale of the ratio decidendi in *Gcaba* and *Chirwa* is that once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. The ratio cannot justifiably be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. …'

[36] As stated above, there is a clear duty on a responsible functionary to correct an irregularity. It is thus untenable to accept that the responsible functionary must then just live with what happened in internal disciplinary proceedings, and be left without a remedy, if such an irregularity indeed exists. A consideration of the provisions of the LRA leads to a conclusion that the only feasible remedy that can be utilized by the State is an application in terms of Section 158(1)(h) of the LRA, brought by the responsible functionary, to remedy that which had gone wrong. In *Hendricks*[8] the Court held:

> '… The only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review; and s 158(1) *(h)* of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer. …'

[7] (2015) 36 ILJ 163 (LAC) at para 27.
[8] Id at para 27.

[37] The process of utilization of Section 158(1)(h) contemplates a review application. This being the case, it must then be established on what review grounds such a review application must be brought. In *Hendricks*[9], the Court held:

> 'In sum therefore, the Labour Court has the power under s 158(1)*(h)* to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'.

[38] More recently, the Court in *Merafong City Local Municipality v SA Municipal Workers Union and Another*[10] similarly pronounced:

> 'The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has the power (and jurisdiction) to review them on any grounds 'permissible in law'. Permissible grounds in law would include the constitutional grounds of legality and rationality and, if they constitute 'administrative action', on the grounds that are stipulated in PAJA …'

[39] In its founding affidavit, the applicant relies on the review grounds founded on the principle of legality. The applicant has not relied on PAJA. Dealing with 'legality' the Court in *Hendricks*[11] said:

> '…. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.'

[40] The Court in *Khumalo*[12] also specifically dealt with the meaning of 'legality', in the context of a review application under Section 158(1)(h), and held:

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[9] Id at para 29.
[10] (2016) 37 ILJ 1857 (LAC) at para 38.
[11] Id at para 28.

> '… The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. …'

[41] In *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*[13] the Court held that the principle of legality had developed over the past decade, to the extent that a parallel system of review for actions which falls outside of the strict definition of administrative action, has developed. Having so held, the Court then proceeded to set out this development as follows:[14]

> '… Public functionaries are required to act within the powers granted to them by law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another*: *In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:
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> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

The Court in *Weder*[15] then proceeded to consider this component of rationality as part of the legality enquiry, and held:

> 'In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. See *Gauteng Gambling Board & another v*

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[12] (*supra*) at para 28.
[13] (2014) 35 ILJ 2131 (LAC) at para 33.
[14] Id at para 34.
[15] Id at para 35.

MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) at para 47. Furthermore, in *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 39 Yacoob ADCJ held:

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.''

[42] Of further guidance when considering review grounds based on legality is the following *dictum* in *Ntshangase v MEC for Finance: KwaZulu-Natal and Another*[16], where it was held:

'… All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all the relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with ss 195 and 197 of the Constitution. …'

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

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

43.2 The decision of the chairperson must account for all the relevant facts placed before him or her. Where the chairperson fails to consider

[16] (2009) 30 ILJ 2653 (SCA) at para 18.

material facts or principles, the decision made can be said to be irrational;

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

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

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

[44] Against the above principles, I will now proceed to consider the applicant's application to review and set aside the decision of the first respondent where it came to the alleged misconduct committed by the second respondent, by acquitting her of the same.

Analysis: review application

[45] In its founding affidavit, the applicant principally relies on the grounds of review that the determination of the chairperson (first respondent) is not rationally connected to the power afforded to him, as well as the fact that the decision of the first respondent does not account for all of the facts and principles placed before him. The applicant complains that these failures have resulted in the first respondent arriving at an unreasonable and irrational result, and acted unfairly towards the applicant.

[46] According to the applicant's founding affidavit, there were substantial objective facts and evidence placed before the first respondent that demonstrated that the second respondent completely failed in the execution of her duties of appointment as chairperson of the interview panel under the Instruction, but the first respondent had no regard to this at all. The applicant has also raised an issue that the facts and evidence showed that the second respondent was dishonest in the carrying out of her duties, which was similarly entirely

disregarded by the first respondent. The applicant also took issue with the rejection by the first respondent of the evidence of Captain Mokheseng.

[47] Before dealing with the actual facts and evidence in this matter, it must be pointed out that discipline in the applicant is conducted in terms of disciplinary regulations published under Section 24(1) of the South African Police Services Act[17] ('the Regulations'). Regulation 3[18] *inter alia* provides that the purpose of the Regulations are to support constructive labour relations in the SAPS, to ensure that supervisors and employees share a common understanding of misconduct and discipline, in order to promote acceptable conduct in terms of the provisions of the Regulations, to provide a user friendly framework in the application of discipline and to prevent possible arbitrary actions by supervisors toward employees in the event of misconduct.

[48] Regulation 4[19] sets out the principles on which the Regulations are based, and these include that discipline must be applied in a prompt, fair, consistent and progressive manner, and that employees are ensured fair treatment in that employees must enjoy a fair hearing, be timeously informed of allegations of misconduct made against them, and receive written reasons explaining the rationale for any decision.

[49] The above provisions in the Regulations to a large extent mirror Schedule 8 of the LRA where it comes to discipline for misconduct.[20] In *Provincial Commissioner, Gauteng: SA Police Service and Another v Mnguni*[21] the Court specifically considered Regulations and said:

> 'I agree with counsel for the appellants that what we are dealing with here is quintessentially a labour issue. … The regulations are a product of an agreement reached between the National Commissioner of SAPS, as employer, and all the unions admitted to the Safety & Security Sectoral Bargaining Council (regulation 2). Their purpose is set out in regulation 3, and is, inter alia, to support constructive labour relations in the police service, to

[17] Act 68 of 1995. The applicable version of the disciplinary regulations themselves were published by way of GN R643 in Government Gazette No 28985 of 3 July 2006.
[18] Regulation 3(a) and (c).
[19] See in particular Regulation 4(b) and (d).
[20] See Schedule 8 Clause 4(1) – (3) and Clause 7.
[21] (2013) 34 ILJ 1107 (SCA) at para 20.

> ensure that supervisors and employees share a common understanding of misconduct and discipline, to provide a user-friendly framework in the application of discipline, and to prevent possible arbitrary actions by supervisors towards employees in the event of misconduct. Clearly, therefore, the disciplinary and appeal procedures that culminated in the respondent's dismissal, including the dismissal itself, involve employment relations, which are expressly regulated by s 23 of the Constitution and s 185 of the LRA.'

[50] The applicant's review application, and in particular the grounds of review raised, must be considered with due regard to the objectives enshrined by the Regulations. The first aspect to consider is what is tantamount to splitting or duplication of charges in this case. As touched on above, the 10 individual charges brought against the second respondent can in essence be consolidated into three charges, each relating to a specific component of overall the same incident. What the applicant did is similar to the following *dictum* in *National Union of Metalworkers of SA and Others v Atlantis Forge (Pty) Ltd*[22] where the Court said:

> 'The multiplicity of charges levelled at Willemse involves a measure of splitting and duplication and, frankly, are a bit of an overkill. …'

It must thus first be determined exactly what the gravamen was of the charges the second respondent actually competently faced.

[51] In my view, the alleged misconduct of the second respondent must be decided on the basis of deciding whether the evidence and facts showed that the second respondent was guilty of the following three misconduct charges:

51.1 Unprofessional conduct and not complying with legal obligations / duties, in failing to attend at the interview panel meeting on 14 February 2013 at all, and attending materially late on 15 February 2013, without proper cause or reason, resulting in a waste of time and resources, and tarnishing the image of the employer.

[22] (2005) 26 ILJ 1984 (LC) at para 155. See also *Ntshangane v Speciality Metals CC* (1998) 19 ILJ 584 (LC) at paras 17 – 18; *Wozney v Myhill and Others* [2008] JOL 21309 (LC) at para 13; *Specialised Belting and Hose (Pty) Ltd v Sello NO and Others* [2009] 7 BLLR 704 (LC) at para 19.

51.2 Dishonesty, unacceptable behaviour and breach of duty of good faith, relating to the refusal to sign off on the list of candidates approved by the panel, and/or the alterations which then took place to the final candidate list on 18 and 19 February 2013, followed by the presentation of what was in effect an irregular list to the commissioner for approval.

51.3 Insubordination in failing to conclude the interviews by 15 February 2013 deadline as instructed by the commissioner.

A consideration of the written outcome by the first respondent showed that he in effect appreciated this kind of charge consolidation, and he also focussed only on these principal issues. This is evident from the manner in which he dealt with each individual charge, where he in essence repeated the same basic reasoning when dealing with each individual charge. I shall similarly, in considering the review grounds of the applicant, focus only on the three principal charges I have identified above. I add that even though this is discipline in the SAPS, the misconduct must still only be proven on the basis of a balance of probabilities, and not beyond reasonable doubt.[23]

[52] Before dealing with the evidence, I am compelled to point out that vast tracts of the second respondent's evidence in the disciplinary proceedings was never put to the applicant's four witnesses under cross examination. This in itself must materially detract from the credibility of her case, an issue the first respondent never appreciated. In *ABSA Brokers (Pty) Ltd v Moshoana NO and Others,*[24] it was held as follows:

> 'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see van Tonder v Killian NO en Ander 1992 (1) SA 67 (T) at 72I). He has not a right to cross-examination but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that he evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on

[23] See *Clarence v National Commissioner of the SA Police Service* (2011) 32 ILJ 2927 (LAC) at para 39.

[24] (2005) 26 *ILJ* 1652 (LAC) at para 39; See also *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) footnote 13 where it was said: 'To rely on evidence in the absence of its having been put to the opposing party's witnesses under cross-examination constitutes a reviewable defect.'

> the basis of which it is alleged that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see Zwart and Mansell v Snobberie (Cape) (Pty) Ltd 1984 (1) PH F19(A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony…

And in *Trio Glass t/a The Glass Group v Molapo NO and Others*[25] the Court said the following:

> '… The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded….'

[53] Turning to the findings of the first respondent, and dealing firstly with the charge relating to the second respondent's attendance (or lack thereof) at the interviews on 14 and 15 February 2013, the first respondent acquitted her of this charge on the basis that he accepted her testimony that she was waiting for a list of the candidates to be interviewed, from her cluster. As to the second part of this charge, the first respondent found that no direct evidence was presented with regard to the waste of time and resources resulting from the second respondent not arriving at the interviews.

[54] I have to confess that I have difficulties with the reasoning of the first respondent on this charge, and it is in my view apparent that the first respondent completely ignored important evidence and pertinent probabilities. It was clear that the commissioner wanted the interview process concluded by 15 February 2013, and there were a substantial number of interviews needed to be done. It must have been patently apparent to the second respondent, as chairperson of the interview panel, that it would be wholly inappropriate to only start these interviews late in the afternoon on 15 February 2013, when it was undisputed that the interviews were actually scheduled to start on the morning of 14 February 2013.

[55] It would appear from the reasoning of the first respondent that he completely ignored the clear and, in essence, uncontradicted evidence of Colonel Jonck. He testified that he specifically informed the second respondent, as panel

[25] (2013) 34 *ILJ* 2662 (LC) at para 41.

head, of the interviews that would start on 14 February 2013 at 08h00 and arranged this with her. Also, the entire panel and all the candidates were arranged to be present on 14 February 2013 for the interviews, and were in attendance. Colonel Jonck also testified that he telephoned the second respondent several times on 14 February 2013 to ask where she was and she said she was 'busy' at the provincial head office. Jonck testified that the panel and the candidates waited all day on 14 February 2013 for the second respondent to arrive, when he eventually called the second respondent to obtain permission to release them all, with instructions to return the following day.

[56] When the second respondent again did not arrive the morning of 15 February 2013, Jonck called her again, and she answered she was 'on her way', only to finally arrive virtually at the end of the day. It is surely obvious that during this entire time, the entire panel and candidates simply waiting for the second respondent to arrive, is an utter waste of time and resources, clearly an embarrassment, and smacks of unprofessional behaviour on her part.

[57] I also have difficulty in understanding the first respondent's acceptance of what is the second respondent's mere *ipse dixit* that she was waiting for a list of candidates from the cluster. How can this explanation have any substance if all the other panel members, as well as all the candidates on the list to be interviewed, were ready and present to proceed with the process on 14 February 2013? Jonck, as station commander at SAPS Actonville had attended to all the logistics. Also, Jonck specifically arranged with her on 14 February 2014 to come on both 14 and 15 February 2013. There was nothing for the second respondent to do but to arrive and chair the interview panel. Had the first respondent properly, rationally and reasonably considered this evidence, he would not have accepted the explanation by the second respondent that she was waiting for some or other list from the cluster.

[58] I have little hesitation in concluding that the first respondent, in acquitting the second respondent of the charge relating to her attendance at the interviews on 14 and 15 February 2013, ignored crucial evidence and pertinent probabilities, tainting his determination with irrationality and rendering it unreasonable. The conclusion arrived at is at odds with the principle of

legality, as contemplated by the review test referred to above. I am satisfied that the second respondent, without any proper cause of reason, simply neglected to attend at a process she was actually instructed to preside over, which is entirely unacceptable behaviour. It follows that the second respondent must be guilty of this charge.

[59] The next finding of the first respondent to be considered is his finding where it comes to the list of approved candidates, and the subsequent alteration of the same. As referred to above, the first respondent acquitted the second respondent of any wrongdoing on this charge as well. The first respondent's reasoning in this regard, in summary, was that the testimony of Captain Mokhoseng gave relating to the list had to be rejected, because he contradicted his earlier statement and did not report his allegation that the second respondent did not want to sign the list because Bocibo was not included, to Alwar (the secretary) when she asked him on 18 February 2013 if the second respondent had signed the list. The first respondent also accepted the second respondent's explanation that she trusted that the list ultimately presented to her was correct and she just signed it on that basis, which he regarded as a proper defence.

[60] In considering the aforesaid reasoning of the first respondent, one has to first deal with the undisputed evidence. What was undisputed is that it was agreed by the panel that the 11 candidates with the highest scores would be listed by the panel secretary, and this list would then be presented to the second respondent as head of the panel to sign off. It is equally undisputed that the secretary, Alwar, prepared the proper list of candidates with the highest scores, dated 18 February 2013, and this list did not include Bocibo. It is finally undisputed that the list was altered by Captain Mokhoseng on 19 February 2013 to include Bocibo, and this list was then presented to the second respondent and she simply signed it off.

[61] What is hotly contested is the manner of the second respondent's involvement in the alteration of this list. Captain Mokhoseng testified that he did take the list to the second respondent on 18 February 2013 to sign, and she refused because there was a 'mistake' in that Bocibo's name did not appear on this list. Mokhoseng testified that he took it on himself to alter the list to include

Bocibo, which he then presented to the second respondent the following day, and she then signed it. According to the second respondent, Mokhaseng never came to her on 18 February 2013, and only brought her a list on 19 February 2013 which she signed. The first respondent, as touched on above, in essence concluded that all that happened where it came to the list and the alteration thereof was due to Mokhoseng's own irregular conduct, and the second respondent had no reason not to trust him.

[62] In the context of the undisputed facts, there is yet again another pertinent issue the first respondent simply did not consider. This is the fact that the second respondent actually signed an irregular list on 19 February 2013, when she should never have done this in the first place. As panel chairperson, she had the direct duty to ensure all was in order when she signed the list, and when this list was submitted to the provincial commissioner to make the appointments. That is the very reason why she is, in terms of the Instruction, directly responsible for all record keeping and making the actual recommendation for appointments.

[63] For her to, on her own version, just take a list and sign it without any form of checking if it is correct is an indictment in itself. Considering her clear duties as panel chairperson, she must have had all the records available, and then it would have been a simple exercise of comparing the names on the list to the marks awarded as reflected in the interview records. The fiduciary duty that rested squarely on the shoulders of the second respondent necessitated that she had to do this, before she signed the list. To defer to a subordinate and seek to shift all blame away from her on the basis of having some form of misplaced 'trust' in him is simply untenable.

[64] This kind of excuse of misplaced trust creates a fertile breeding ground in which corruption and maladministration can flourish. To ascribe to such an approach would make it easy for a responsible functionary in the public service to walk away from such situations, scot free so to speak, by just saying he or she trusted everyone else. In my view, an uncompromising approach must be adopted in the public service in holding all responsible functionaries fully accountable for any corruption or maladministration perpetrated under their watch, even if they are not directly involved. That is the only way this

scourge can be eradicated, by starting in essence at the top. In *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*[26] it was held:

> 'Corruption and maladministration do not only pose a serious threat to our democratic order, but are also inconsistent with the Constitution. As observed by this Court in *Shaik*, corruption is "antithetical to the founding values of our constitutional order." In *Heath*, this Court held:
> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state."'

[65] As touched on above, and under the Instruction, the second respondent as properly appointed panel chairperson owed a fiduciary duty to the applicant to ensure that the process was properly and lawfully conducted, completed, and a proper and lawful list of approved candidates be submitted to the applicant for appointment. The real charge against the second respondent, as contained in the plethora of individual formulated charges, was squarely aimed at a contravention of this duty. In *Sappi Novoboard (Pty) Ltd v Bolleurs*[27] it was held as follows:

> 'It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully … The relationship between employer and employee has been described as a confidential one … The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' …'

[66] In *Ganes and Another v Telecom Namibia Ltd*[28] the Court said:

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[26] 2014 (5) BCLR 547 (CC) at para 47. See also *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (1) BCLR 1 (CC) at para 1.
[27] (1998) 19 *ILJ* 784 (LAC) at para.7.
[28] **(**2004) 25 ILJ 995 (SCA) at para 25. See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009) 30 ILJ 2333 (SCA) at paras 16 – 17.

> 'As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests; not to place himself in a position where his interests conflicted with those of the respondent …'

The Labour Appeal Court in *Bonfiglioli SA (Pty) Ltd v Panaino*[29] applied the above ratio in *Ganes* as follows:

> '… at common law, the employee owes the employer a duty of good faith. In *Ganes & another v Telecom Namibia Ltd*, it was said that the duty of good faith entails that an employee is obliged not to work against the interests of his/her employer and not to place himself/herself in a position where his/her interests conflict with those of the employer. In *Council for Scientific & Industrial Research v Fijen*, it was stated that:
> 'It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the "innocent party" to cancel the agreement.'

[67] As referred to above, the first respondent in effect placed all the blame for what happened on Captain Mokhoseng. I accept that Captain Mokheseng was an active and direct participant in the irregularity relating to the list, and he should be blamed. But this does not mean that the second respondent is excused. She simply cannot be permitted to shirk her fiduciary duty towards the applicant, considering the seniority of her position and the specific responsibility bestowed upon her, by pointing a finger at Captain Mokhoseng.

[68] What is hard to accept is that if it was all Captain Mokheseng's doing to irregularly alter the list, why would he simply not prepare his own list in the first place and take it to the second respondent to approve. Why would the secretary, Alwar, prepare a proper list in the first place which remained on record, and why would Captain Mokhoseng tell her on 18 February 2013 when she asked whether the second respondent had signed the list that she had

[29] (2015) 36 ILJ 947 (LAC) at para 26

not. All Captain Mokheseng needed to do, if what happened was all his own doing, was to prepare a list himself from the outset, have the second respondent sign it, and tell Alwar it had been signed.

[69] Considering the evidence, it is my view that Captain Mokhoseng indeed went to the second respondent on 18 February 2013 to have her sign the list. I do accept that the second respondent never actually instructed Captain Mokhoseng to change the list, and that all she did was to refuse to sign it because she said there was a 'mistake' on it because Bocibo's name was not there. This lack of a specific instruction to change the list emanating from the second respondent was conceded by Captain Mokhoseng in evidence. Where Captain Mokhoseng then went wrong is that he acceded to the view adopted by the second respondent and then took it upon himself to amend the list and change records to have Bocibo's name appear thereon, and there being a substantiated basis for this being the case. But these wrongdoings of Captain Mokhoseng cannot mean the second respondent escapes liability. Again, what she should have simply done is to take the list given to her on 18 February 2013, compare it with the scores on record, and then either approve it if it matched the highest scores or reject it if it did not, with instructions how to rectify it. The conduct of the second respondent relating to the list gives rise to a natural and logical inference that she wanted it to reflect the name of a particular person, which would of course be irregular. In simple terms, she 'implied' to Captain Mokhoseng what she wanted, and he obliged.

[70] It thus follows that the first respondent, in acquitting the second respondent of the charge relating to the irregular amendment of the recommended candidate list on 18 and 19 February 2013, misconstrued the evidence and failed to have regard to crucial probabilities. Yet again, this infringes on the principle of legality as contemplated by the review test set out above, and is an irregular and unreasonable outcome. In short, I am satisfied that the second respondent failed to discharge her duties, and breached the fiduciary duty that rested on her, in not ensuring that a proper and lawful candidate list was approved by her for presentation to the commissioner. I also accept that she was indeed involved (albeit indirectly) in the irregular amendment of the candidate list. I conclude that the second respondent should have been found guilty of this charge as well.

[71] Turning then to the third charge of the second respondent failing to adhere to the instruction to complete the interview process by 15 February 2013, the evidence speaks for itself. It was undisputed that the interview process, by virtue of an instruction from the commissioner, needed to have been completed on 15 February 2013. Clearly, this contemplated close of normal business on that day. The reality is that because of the second respondent's failure to timeously attend the interviews, this deadline was not met. As I have said above, the second respondent had no legitimate explanation for not attending at the interviews as she was required to do.

[72] The manner in which the first respondent chose to deal with this charge is most peculiar. He in effect reasons that the 15 February 2013 deadline ended just before midnight on that day, and because the interviews concluded at 02h00 into the following day, there was no one to 'receive' the outcome as it was outside business hours, which meant the deadline had been met. This reasoning is contrived and unsustainable. As I have said above, a deadline of 15 February 2013 contemplated close of normal business on that day, and not just before midnight. In order to comply with the deadline, the 'outcome' of the interviews must be susceptible to being 'received' whilst there was still someone to receive it. Added to this, the point remains that the second respondent could have concluded the process by the stipulated deadline on 15 February 2013, but due to her own failure she did not. And in the end, completion of the process at 02h00 on 16 February 2013 is simply not completion by 15 February 2013, no matter how one looks at it.

[73] Therefore, the manner in which the first respondent dealt with this third charge of insubordination leaves much to be desired, and clearly infringes on the principle of legality. The first respondent's finding negates pertinent and even undisputed evidence, and his reasoning is irrational and irregular. By acquitting the second respondent on this charge, the first respondent acted unreasonably and irrationally. The evidence fully supported an outcome that the second respondent was guilty of this charge, and I so determine.

[74] In the end, the Court in *Hendricks*[30] held:

[30] (*supra*) at para 20.

> 'One of the principal objects of local government is to provide for democratic and accountable government to local communities. The first respondent has a public duty to eradicate corruption and malfeasance from within its ranks and structures. …'

Even though the Court in *Hendricks* was dealing with a local authority, the exact same reasoning would certainly equally apply to a national public service entity, such as the applicant. The applicant has a duty to eradicate the kind of behaviour referred to above. If the current situation resulting from the decision of the first respondent is not set aside, it would be a serious setback in the fight against maladministration and corruption, and would send the wrong kind of message to other employees in the applicant where it comes to the conducting of discipline.

[75] In summary, I conclude that the applicant's review application has substance. The decision of the first respondent as chairperson acquitting the second respondent of all the charges against her infringes of the principles of legality and rationality. The first respondent failed to account for all the relevant facts placed before him, and did not consider several material facts and principles. The finding of the first respondent acquitting the second respondent of all the charges against her therefore falls to be reviewed and set aside.

[76] Because the applicant's review application succeeded, it is therefore still necessary to decide the merits of the second respondent's application to declare her current suspension unlawful, and to uplift the same, which I will turn to next.

<u>The suspension of the second respondent</u>

[77] The second respondent does not take issue with her initial suspension effected on 6 August 2014, pending the conclusion of the disciplinary proceedings. The case of the second respondent is that this suspension ended with her acquittal by the first respondent on 29 October 2014, and it was the later suspension that must be held to be unlawful.

[78] On the undisputed factual matrix, it is clear that immediately following her acquittal, the second respondent sought to resume her normal duties, but was prevented from doing so by the applicant. After some to and fro on the issue, the applicant then sought to 'formalize' the process, for the want of a better description, by implementing what it called a 'common law' suspension on 25 November 2014, after asking the second respondent to make representations as to why this should not happen. This 'common law' suspension, as the applicant called it, was implemented pending the finalization of the review application it had already brought at that time, and it would be on full pay.

[79] According to the second respondent, this 'common law' suspension of 25 November 2014 was unlawful. At the heart of the second respondent's case in this regard is a contention that such a 'common law' suspension simply cannot be applied in the applicant, because all suspensions are determined by the Regulations, which only makes provision for suspension until the conclusion of internal disciplinary proceedings, which had already happened. The second respondent contended that there is no provision applicable in the applicant that would allow for a suspension pending the conclusion of a review application.

[80] The suspension of employees in the applicant is indeed regulated by Regulation 13 of the Regulations. Considering the issues raised by the second respondent, it is important to quote this regulation in full, which reads:

> '(1) The employer may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner.
> (2) The National or the Provincial or Divisional Commissioner (the Commissioner) may suspend the employee without remuneration, if the Commissioner on reasonable grounds, is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in annexure A and that the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed: provided that —
>
> *(a)* before suspending an employee without remuneration, the employee is afforded a reasonable opportunity to make written representations;
> *(b)* the Commissioner considers the representations and informs the employee of the outcome of the representations;

(c) the disciplinary process must be initiated within 14 calendar days of the date of the decision to suspend the employee without remuneration; and

(d) if the disciplinary process is not completed within 60 calendar days from the commencement of the suspension, the question of continued suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the Commissioner must consider. The Commissioner must take any decision on continued suspension within 7 calendar days of receiving written representations on continued suspension and inform the employee of the outcome of the representations. A decision that the suspension continues, may only be for a further period of 30 calendar days.

(3) A suspension is a precautionary measure.'

[81] It is clear that Regulation 13 contemplates two kinds of suspensions, one being with pay, and the other being without pay. However, and in both instances, the suspension must be a precautionary measure.[31] Where it comes to suspensions without pay, a number of conditions have to be met where it comes to the lawfulness of such a suspension, which include that the alleged misconduct must be serious with a *prima facie* assessment that the case against the employee is strong, the opportunity to make representations prior to suspension, prompt initiation of disciplinary proceedings, a maximum permitted time limit for such suspension. None of these conditions apply to a suspension with pay.[32]

[82] In *Ntuli v SA Police Service and Others*[33] the Court said the following about the application of Regulation 13:

> 'It is immediately clear from the regulation that an employee does not have the right not to be suspended, provided that it is done in terms of the regulation.
>
> The fact that the applicant has not been found guilty of misconduct, is entirely irrelevant to the suspension. The regulation makes it clear that it is a precautionary measure taken before any misconduct has been proven …'

[31] *Police and Prisons Civil Rights Union on behalf of Sephanda and Another v Provincial Commissioner, SA Police Service, Gauteng Province and Another* (2012) 33 ILJ 2110 (LC) at para 11.
[32] See *Ntuli v SA Police Service and Others* (2013) 34 ILJ 1239 (LC) at para 15.
[33] (2013) 34 ILJ 1239 (LC) at paras 16 – 17.

[83] Because any suspension under Regulation 13 must be a 'precautionary measure', it has to be considered what 'precautionary' in this context means. In *Police and Prisons Civil Rights Union on behalf of Sephanda and Another v Provincial Commissioner, SA Police Service, Gauteng Province and Another*[34] held:

> **'**A precaution is 'a measure taken beforehand to avoid a danger or ensure a good result' (*Shorter Oxford English Dictionary* 6 ed 2007 vol 2). …'

[84] Applying the above, I conclude that there is nothing in Regulation 13 which creates a right in favour of the second respondent not to be suspended. The applicant still remains entitled to suspend the second respondent, provided it just complies with the provisions of Regulation 13. And where it comes to a suspension with full remuneration, all that the applicant would need to show for the suspension to be lawful under the Regulations is that it was a precautionary measure, which in this case is to ensure a 'good result'.

[85] On the facts *in casu*, the suspension of the second respondent on 25 November 2014 was a suspension with full remuneration. Despite not even being obliged to do so, the applicant nonetheless also afforded the second respondent an opportunity to make written submissions prior to suspension. All that remains to be considered is whether this suspension is indeed a precautionary measure. In *Koka v Director General: Provincial Administration North West Government*[35], Landman J (as he then was) referred with approval to the following remarks made by Denning MR in *Lewis v Heffer and others* [1978] 3 All ER 354 (CA) at 364*c-e*:

> 'Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and he is suspended until he is cleared of it. … The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The

[34] (2012) 33 ILJ 2110 (LC) at para 12.
[35] (1997) 18 ILJ 1018 (LC) at 1028E-I.

> others will not trust the man. In order to get back to proper work, the man is suspended..."

[86] The applicant, *in casu*, indeed relied on the concept of what can be said to be 'good administration'. The applicant described it that the second respondent's presence at work would not be conducive to sound labour relations, until the review application had first been finally determined. I am satisfied that this would indeed be a proper basis for what can be considered to be a 'precautionary measure'. Also, the applicant in suspending the second respondent referred to the seriousness of the allegations against her, as well as the seniority of her position. Similarly, this would be proper cause for invoking suspension as a precautionary measure, considering what the Court said in *Mojaki v Ngaka Modiri Molema District Municipality and Others*[36]

> '… The allegation that the applicant refused to obey instructions from the administrator is in my view very serious taking into account in particular the level of his responsibility and seniority. It is for this reason that I am of the view that the facts and the circumstances justified the action taken by the administrator to suspend him. In other words, there exists an objectively justifiable basis for the administrator to deny the applicant access to the workplace …'

[87] Therefore, I am satisfied that the suspension of the second respondent on full remuneration on 25 November 2014 was indeed a proper precautionary measure pending the finalization of the review application, which had already been brought at that time, and was in line with what is provided for in Regulation 13(1) as read with subclause (3). It does not really matter what the applicant called it, namely a 'common law' suspension. Whatever the label may be that is attached to the suspension, it is nonetheless permitted by the Regulations for the reasons I have set out above.

[88] In any event, and under the common law of contract, an employer would be justified in excluding an employee from the workplace if the employer deemed it prudent or appropriate to do so, provided this exclusion does not remove or

[36] (2015) 36 ILJ 1331 (LC) at para 34.

prejudice the right of the employee to be paid.[37] This is certainly the case *in casu*, based on the facts already mentioned.

[89] It must be remembered that is not an issue about whether the suspension is fair or unfair. It is of course true that the second respondent would have always been entitled to challenge her suspension, even if it was just a precautionary measure and on full pay, as an unfair labour practice[38] to the appropriate bargaining council.[39] The right to fair dealing in the case of suspension cannot be implied into the contract of employment, where the LRA specifically provides for it under the auspices of the unfair labour practice jurisdiction. In *SA Maritime Safety Authority v McKenzie*[40] the Court said:

> '…. insofar as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices. Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer.'

[90] The second respondent has not pursued an unfair labour practice dispute. Instead, she chose to approach this Court directly to challenge her suspension as being unlawful. Having failed to establish unlawfulness, the second respondent cannot fall back on fairness, and her application must fail.[41] The second respondent respondent's application to declare her suspension of 17 November 2014 to be unlawful must thus be dismissed.

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[37] See Koka (*supra*) at 1027F-J; *HOSPERSA and Another v MEC for Health, Gauteng Provincial Government* (2008) 29 ILJ 2769 (LC) at para 17; *Singh v SA Rail Commuter Corporation Ltd t/a Metrorail* (2007) 28 ILJ 2067 (LC) at paras 8 and 12.

[38] Section 186(2)(b) reads: ''any unfair act or omission that arises between an employer and an employee involving- .... the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.*'*

[39] See *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at paras 43 and 46; *Golding v HCI Managerial Services (Pty) Ltd and Others* (2015) 36 ILJ 1098 (LC) at para 43; *Mere v Tswaing Local Municipality and Another* (2015) 36 ILJ 3094 (LC) at para 56; *Ntuli* (*supra*) at paras 21 – 22.

[40] (2010) 31 ILJ 529 (SCA) at para 56. See also *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 22; *Lebu v Maquassi Hills Local Municipality (1)* (2012) 33 ILJ 642 (LC) at para 12.

[41] See *Mere* (*supra*) at paras 53 and 55.

Conclusion

[91] Therefore, and based on all the reasons set out above, I conclude that the first respondent's decision where it came to acquitting the second respondent of the misconduct with which she had been charged is irrational and fails to satisfy the principle of legality. It must be reviewed and set aside, and be substituted with a determination that the second respondent is guilty of the three charges summarized above, being her failure to timeously attend at the interviews on 14 and 15 February 2013, the irregular amendment of the candidate lists on 18 and 19 February 2013, and finally the failure to comply with the 15 February 2013 deadline to complete the interview process.

[92] Once an employee is found guilty of a charge, the next consideration in any disciplinary proceedings would be that of an appropriate sanction. As said in *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[42]:

> '…a typical arbitration comprises essentially two phases. The first is the receipt and evaluation of evidence in order to make factual findings. That phase is governed by the ordinary rules of evidence and procedure and no value judgment is involved. If the employee's guilt is established, the second phase arises, being the identification and weighing of the factors relevant to the determination of sanction. Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts. Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair. …'

I see no reason why the same considerations should not apply to deciding a review application relating to a finding of an internal chairperson in the public service sector, as would the case *in casu*.

[42] (2010) 31 ILJ 2475 (LC) at para 19. See also *Bidair Services (Pty) Ltd v Mbhele NO and Others* (2016) 37 ILJ 1894 (LC) at para 69.

[93] The applicant, in its notice of motion, has sought relief in the form a determination that the second respondent be dismissed. But it is impossible to competently make such a determination in these proceedings, considering what must be done in the 'second phase' of the enquiry as articulated in *Theewaterskloof* to properly make such a decision. In deciding whether the decision to dismiss is fair, the 'totality of circumstances' must be considered.[43] This 'totality of circumstances' include the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, whether progressive discipline would be appropriate, the effect of dismissal on the employee, the employee's service record, the issue of the nature of the misconduct, any breakdown of the trust relationship, the existence of dishonesty, the existence of genuine remorse, the job function and the employer's disciplinary code and procedure.[44]

[94] The difficulty in this case is that because the first respondent had acquitted the second respondent, none of these considerations, where it comes to the issue of an appropriate and fair sanction, have been dealt with in evidence before the first respondent. Even in the context of the Regulations, the Court in *Potgieter v National Commissioner of the South African Police Service and Another*[45] said:

> 'Under the heading "APPROPRIATE SANCTION" the disciplinary regulations provide that the aims of a disciplinary sanction are "rehabilitation, deterrence and retribution." The disciplinary regulations further provide that in assessing whether the relationship between the respondent and the affected employee

[43] See the *dictum* of Navsa AJ in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 78. See also *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 94.
[44] See *Sidumo* (*supra*) at paras 116 – 117; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.
[45] [2008] JOL 22672 (LC) at para 8

> has broken down because of misconduct the chairperson of the disciplinary hearing should apply the objectives as enunciated in the Labour Appeal Court decisions. The guidelines also recognise that in imposing a sanction a chairperson of a disciplinary hearing would exercise a value judgement taking into account the circumstances of a given case.'

The simple fact is that as yet in this matter, no assessment as contemplated by the aforesaid *dictum* has even happened, and there exists no proper factual matrix upon which it would even be possible for me to make such an assessment.

[95] The issue of an appropriate sanction to be imposed on the second respondent therefore cannot be decided by me in these proceedings. This issue must be remitted back to the disciplinary proceedings presided over by the first respondent for proper determination. The disciplinary proceedings must be reconvened, and the applicant and the second respondent must then, considering that the second respondent is guilty of the misconduct, lead all the evidence and deal with all the considerations prescribed by law so as to enable the first respondent as chairperson to arrive at a fair determination on the issue of an appropriate sanction. I shall therefore remit the determination of an appropriate and fair sanction to be imposed on the second respondent back to the first respondent for determination. In the event that the first respondent is no longer available or incapable of presiding over the disciplinary proceedings, the applicant may appoint an alternative chairperson of equal rank and status to decide this issue, so as to bring this matter to finality.

[96] Also in the interest of bringing this matter to close once and for all, I do not intend to leave the time period within which the disciplinary proceedings must be concluded open ended. I intend to impose a specific time limit within which the disciplinary proceedings must be finally concluded, and a final determination handed down by the chairperson as to the appropriate sanction to be imposed on the second respondent. Considering the time periods as reflected in the Regulations, in general, I consider a period of 60 (sixty) days to be appropriate within which to conclude the disciplinary proceedings against the second respondent.

[97] As stated above, the second respondent's application to declare her suspension to be unlawful must be dismissed.

[98] This then only leaves the issue of costs. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I am mindful of the fact that as matters still currently exist, there is a continuing employment relationship between the applicant and the second respondent. A further consideration is that it was the failure of the applicant's own appointed functionary that made these proceedings necessary. In all these circumstances, the appropriate order where it comes to costs, is to make no order as to costs.

Order

[99] In the premises, I make the following order:

1. The decision of the first respondent handed down on 29 October 2014 acquitting the second respondent of all charges against her, is reviewed and set aside.

2. The decision of the first respondent is substituted with a decision that the second respondent is guilty of the three charges relating to her failure to timeously attend at the interviews on 14 and 15 February 2013, the irregular amendment of the candidate list on 18 and 19 February 2013, and the failure to comply with the 15 February 2013 deadline to complete the interview process.

3. The disciplinary hearing shall be reconvened before the first respondent as chairperson, or failing him a chairperson of equal rank and status, for the purposes of determining an appropriate sanction for the misconduct the second respondent has been found guilty of in terms of this order.

4. The disciplinary proceedings as contemplated by paragraph 3 of this order shall be concluded within 60 (sixty) days of date of this order.

5. The second respondent's application under case number J 1553 / 15 is dismissed.

6. There is no order as to costs.

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S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv L Pillay
Instructed by:	The State Attorney
For the Second Respondent:	Adv G Benson
Instructed by:	Ndebele Attorneys