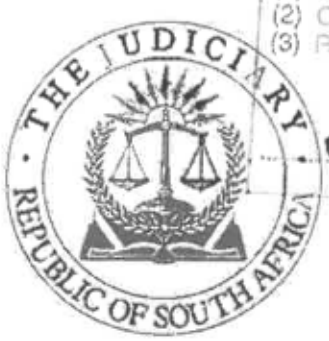

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 899/19

In the matter between:

DEPARTMENT OF DEFENCE **Applicant**

and

KAGISO PHILIMON THAMAGA N.O. **First Respondent**

METSE PATRICIA MASOMBUKA **Second Respondent**

Heard: **03 March 2022**

Delivered: **09 March 2022**

Summary: **Review of own decision. A new thinking to be considered in applications seeking to reverse a decision not to impose an appropriate disciplinary sanction. On application of the legality review – reasonableness and rationality - the Labour Court cannot interfere with the disciplinary sanction. *Ntshangase* discussed and followed. Held: (1) The application to review is dismissed. (2) There is no order as to costs.**

JUDGMENT

MOSHOANA J

Introduction

[1] This is an application launched in terms of section 158 (1) (h) of the Labour Relations Act[1] (LRA) in terms of which the Department of Defence (DoD) seeks an order in the following terms:

1.1.1 That the disciplinary hearing sanction dated 23 August 2018 and issued by the first respondent under reference number CD HR SD&P/DLSR/R/104/29/6/1, CD HR SD&P/DLSR/R/89003727CA is reviewed and set aside.

1.1.2 The sanction of final written warning is substituted with a sanction that the second respondent is dismissed in terms of clause 7.4 (a) (viii) of the Resolution.

1.1.3 In the event that any party opposes this application, that party is directed to pay the costs thereof.

[2] Metse Patricia Masombuka (Masombuka) duly opposes the application. I may point out upfront that Ms Rantho, appearing for the applicant, without seeking an amendment to the notice of motion, submitted that after reviewing, this Court must remit the matter for reconsideration. This in not so many words simply implies holding of a second hearing. This request to remit cannot be done, even under the banner of "further and alternative relief" which of itself is conspicuously absent from the present notice of motion. Given the view, I take at the end it shall be obsolete to engage with this issue any further in this judgment.

Background facts

[3] Masombuka is employed by the DoD as a Senior Accounting Clerk in the Finance Department. She is stationed at Dunnotar. One of the functions of Masombuka was to render cash payment services to the clients of the DoD in the area where she was stationed.

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[1]No. 66 of 1995, as amended.

[4] On 6 February 2018, the Chief Accounting Clerk performed a weekly inspection on a sub-account prescribed as 099239072 and discovered that there was a shortage of an amount equivalent to R33 408.90. This shortage arose from the cash that was collected or kept by Masombuka. The shortage was reported to a Senior State Accountant who in turn instructed Masombuka to cease payments to clients until the error that led to the shortage is established. The Senior State Accountant conducted a process seeking to ascertain the error and discovered that the shortage was in fact R40 081.80.

[5] The Senior State Accountant reported the cash deficit to a Director: Stores and Supply Related Payment. Resultantly, an investigation into the shortage was launched, which culminated in a disciplinary process launched against Masombuka. In that process, Masombuka faced the following allegations:

> "That you 89003727CA, Ms Metse Patricia Masombuka negligently mismanaged the finances of the State in that you could not balance your Sub Advance Account 099239072 on 13 February 2018 which resulted in a loss of State funds to the value of R40 081.80 at the Finance Accounting Satellite Office Dunnotar."

[6] Masombuka pleaded guilty to the charge as framed above. Mr Kagiso Philimon Thamaga (Thamaga) as an appointed chairperson of the disciplinary process accepted the plea of guilt, imposed a sanction of a final written warning, and ordered Masombuka to repay the lost R40 081.80.

[7] The DoD was displeased with the sanction imposed by Thamaga. As a sequel, the present application was launched.

Grounds for review

[8] The DoD contends that Thamaga committed a gross irregularity when he imposed a sanction that is so fundamentally mistaken and flawed. It contends that the sanction of final written warning is inappropriate. Thamaga ignored aggravating circumstances and gave undue regard to the fact that Masombuka pleaded guilty and showed remorse. The trust relationship was broken beyond repair as result of the act of dishonesty by Masombuka.

[9] Masombuka disagrees with the contentions, submits that the sanction of final written warning is reasonable, and does not amount to an irregularity. In addition, she contends that the review application was launched late under a wrong section of the LRA.

Evaluation

[10] The first issue to deal with is the lateness of the application. Masombuka contends that this application ought to have been launched within six weeks but it was launched eleven months after the impugned decision. This application is veraciously launched in terms of section 158 (1) (h) of the LRA. There is no prescribed period to launch such a review application. Therefore, there is no need for the applicant to seek condonation. The applicant, on the last minute, launched an obsolete application seeking condonation. It offered an explanation why it sought a review application late. This obsolete application stands unopposed. Nevertheless, what obtains in this instance is the delay rule. Recently, the Constitutional Court in *Notyawa v Makana Municipality and others*[2] had the following to say: -

> "[50] As was noted in *Khumalo*, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial powers

[2][2019] ZACC 43 (21 November 2019) at paras 50 and 51.

> to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution. At common law, our courts avoided prejudice to respondents by declining to entertain a review application. Our law has since moved on and PAJA affords courts the wide remedial power, which may be exercised to protect the rights of innocent parties. That power mirrors in exact terms the power contained in section 172(1) (b).
>
> [51] It must be emphasised that when a court exercises the discretion, it must always keep in mind the development brought about by the Constitution and PAJA ... What is important is to note that the exercise of discretion is no longer regulated exclusively by the common law principles which did not permit the flexibility of reversing unlawful decisions while avoiding prejudice to those who had arranged their affairs in terms of the unlawful decision."

[11] The message above seems loud, lucid and clear. It is no longer permissible for a Court of law to avoid its constitutional obligations simply because of the passage of time. In line with the constitutional imperatives of a rule of law, it does seem that a Court of law is more exalted to ascend to the altar, where an allegation is raised – not proven – that a particular decision is threatening the rule of law. Jafta J added that where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision based on unreliable facts does not arise. To my mind a party seeking a review of a decision based on illegality, bears the *onus* to show the alleged illegality. The other party, the respondent in this case, bears very little peril, which may translate to inconvenience, which may be remedied with an appropriate order of costs, if the party heard fails to show the alleged unlawfulness. On the other hand, where a Court of law refuses to hear a matter in the face of clear or potential unlawfulness, to my mind, that court would be failing the foundational principle of the rule of law.

[12] A rule of law is achievable through a functional judiciary. Section 165 (1) of the Constitution of the Republic of South Africa, 1996 (the Constitution)

vests judicial authority in the Courts. Although the common law rule of undue delay still serves a utilitarian purpose, in my view, when regard is had to section 1 (c) read with sections 165 (1), 34, 39 (2) and 173 of the Constitution, unless a hopeless case is so presented, courts must rise to the occasion and defend, where necessary, the rule of law, to ensure a functional State.

[13] In *SITA (SOC) Ltd v Gijima Holdings (Pty) Ltd*[3], the Court asked the question: did the award (impugned decision) conform to the legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review. The Constitutional Court went on to reconfirm the principle set out in *Department of Transport v Tasima (Pty) Ltd*[4] with regard with the issue of delay. In *Gijima*, before dealing with the delay issue the question was posed: What impact, if any, should this delay have? After *Gijima*, the Constitutional Court again in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[5] laid the basis for the delay rule in legality reviews. The majority stated that the approach to overlooking a delay in a legality review is flexible. It set out that it involves taking into account a number of factors. The first of which is (a) potential prejudice to affected parties – this is ameliorable, (b) the nature of the impugned decision – may drive the court to the merits of the review, (c) the conduct of the applicant – state litigants are exalted to act with haste given the available resources, (d) Court compelled to declare the conduct unlawful – as duty bound by section 172 (1) (a) of the Constitution.

[14] The two step approach remains[6]. The first is, is the delay unreasonable? In my view, the delay in this matter is not unreasonable. The second is, should this delay be overlooked? Since the delay is not, in the

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[3] [2017] ZACC 40 (14 November 2017)
[4]2017 (2) SA 622 (CC)
[5][2019] ZACC 15.

[6] In recent times, the Constitutional Court reverberated the steps in *Nehawu v Minister of PSA and others* (case CCT 21/21) [2022] ZACC 6 dated 28 February 2022.

circumstances of this case unreasonable, there is no need to consider the second step. The first preliminary point is accordingly not upheld.

[15] Additionally, Masombuka contends that section 158 (1) (h) of the LRA does not find application in this matter. Subject to the views to be expressed below, I disagree with this contention. Accordingly, the second point is equally dismissed.

[16] In *South African Broadcasting Corporation (SOC) Ltd v Keevy and Others*[7], this Court undertook an elaborative and tortuous exercise to define what a State means as employed in section 158 (1) (h) of the LRA. That exercise was aimed at establishing the diameter and span of the review jurisdiction in terms of section 158 (1) (h) of the LRA. In making its intentions perspicuous, this Court stated the following:

> "In my view, this is an important task that may lessen the load of this Court. Largely, this Court experiences a number of parastatals seeking to challenge decisions of disciplinary committees using section 158 (1) (h) of the LRA."[8]

[17] The *SABC* judgment was never, to the knowledge of this Court, impugned by any of the parties affected. For the purposes of this judgment, this Court shall depart form the premise that the *SABC* judgment stands as an authority for the proposition that parastatals like the SABC are not a "State" within the contemplation of section 158 (1) (h) of the LRA.

[18] This present judgment seeks to revisit another debate allied to the views expressed above. The debate is whether the State and its organs, as defined in the Constitution, in their capacities as employers, should continue to enjoy what appears to be a special privilege to approach this Court under the banner of section 158 (1) (h) of the LRA for the Court to act as a disciplinary appeal body, as it were, and impose an appropriate sanction on their behalf?

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[7][2020] 6 BLLR 607 (LC).
[8]Footnote 26 of the *SABC* judgment.

[19] Likewise, I take a view that the time has come for an attempt to put mental faculties to bear in order to usher a new thinking around this question, which in my view remains vexed[9]. I fervently take a view that *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another*[10], although a binding authority on this Court and the Labour Appeal Court, did not satisfactorily address or resolve this prime question. Ever since *Ntshangase*, it became customary that once a public sector employer is not satisfied with an outcome of an internal disciplinary enquiry, the panacea is to invoke the provisions of section 158 (1) (h) of the LRA. This customary position requires edification in order to give way to a new thinking that may, in my view, be consistent with the Constitution.

[20] Generally, the LRA does not differentiate between public and private employers when it comes to its application. It only excludes members of certain State departments from its scope of application; namely the National Defence Force and the State Security Agency. Section 9 (1) of the Constitution explicitly provides that everyone is equal before the law and has the right to equal protection and benefit of the law. On application of section 9 (1), a private employer must have equal protection and benefit of the law by utilizing the special privilege afforded to public employers. Private employers do drool with desire, I suppose, to have a Labour Court judge dismiss an employee on its behalf. Clearly, if this were to be allowed to happen, a disastrous situation might unfold.

[21] In my view a conundrum arises when a public sector employee whose dismissal as a sanction is imposed as it were or endorsed by a Labour Court judge. Does it mean that an arbitrator whose statutory duty is to determine the fairness of a dismissal shall be bound by the decision of a Labour Court judge *qua* employer? In my view certainly not. Unlike in a situation contemplated in section 188A (8) of the LRA, an employee whose

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[9]Murphy AJA in *Hendricks* remarked, "*The doctrine of permitting the review of private disciplinary review tribunals therefore should continue as part of our law, at least until sound reasons for jettisoning it are found.*" [Para 23]. I consider this as a challenge to find reasons to jettison the doctrine.

[10](2009) 30 ILJ 2653 (SCA).

dismissal receives the blessing or is imposed by a Labour Court judge is still entitled, in terms of section 191 (1) of the LRA, to dispute the fairness of that dismissal. As correctly held in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[11], an arbitrator should not defer to the decision of an employer but must apply his or her own sense of fairness. One imagines a situation where a public sector employer argues before an arbitrator that a dismissal as a sanction is appropriate because it has received the blessings of a Labour Court judge. The reaction of the arbitrator to such an argument is too ghastly to contemplate. Would an arbitrator faced with such an argument pluck the courage to differ with the views of a Labour Court judge? I have my own doubts. Would this not be a beguiled return to the reasonable employer test? In my considered view, it would be.

[22] A further complication may arise in an inevitable instance of an arbitrator deferring to the sanction of the judge (*qua* employer) and fail to apply his or her own sense of fairness. This on its own is a reviewable irregularity, given the statutory duty and mandate of an arbitrator. The orbit will be completed where a Labour Court judge upholds the decision of an arbitrator by not interfering with the sanction of the employer (judge *qua* employer) because the sanction is a fair one. This circuitous position is untenable for various valid reasons, the conspicuous reason, it being in conflict with the maxim of natural justice *nemo debet esse iudex in propria causa* – no one is a judge in his own cause. The Labour Court having on an occasion imposed a fair sanction would certainly become a judge in its own cause when it eventually sits as a Court of review. In addition, it is a fertile ground for raising defences like *res judicata* in respect of the fairness of the sanction. The Labour Court having decided the issue of the fairness of the sanction it imposed involving the same parties would become *functus officio* in a sense. A simple answer to this conundrum is for the Labour Court not to entertain these type of applications. There is a very simple solution.

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[11] [2007] 12 BLR 1097 (CC).

[23] On application of the principle developed in the *BMW (SA) (Pty) Ltd v Van Der Walt*[12], which seems to have been widely accepted in the labour law community, a public sector employer, like a private sector employer can hold a second disciplinary hearing and or internally review the improper sanction. John Grogan in a Journal *Managerial "review" Overriding disciplinary rulings*[13] after reviewing the latest judgments of the Labour Court and the Labour Appeal Court, in particular, the one of *Anglo American Platinum Ltd v Beyers and Others*[14] made the following apt suggestion:

> "The technical answer is provided by *Hendricks v Overstrand Municipality and another* [2014] 12 BLLR 1170 (LAC) that decisions of a disciplinary tribunals in the public sector constitute administrative action reviewable either in PAJA or legality review over which the Labour Court has jurisdiction ...and significantly, because statutory employers have no other means of ridding themselves of errant employees who have survived disciplinary proceedings through the clemency of presiding officers ...
>
> This is not quite correct. As the cases cited above indicate, public sector employers can also override such decisions if they can show "exceptional circumstances" and put that issue in the employee's court to show that there are none, subject only to the chance that they may have to pay some compensation for procedural unfairness which depending on the nature of the employee's offence could be minimal. SARS could rather have asked the Labour Court to consider whether the outcome of the disciplinary hearing to which it objected was reasonable and avoided being dragged repeatedly into expensive judicial debates concerning the "double jeopardy rule"

[12][2000] 21 ILJ 113 (LAC)
[13]Published in the *Lexis* Library.
[14][2021] 42 ILJ 2149 (LAC)

> Public sector employers should therefore consider that option when faced in the future with what they consider irrational decisions of presiding officers. Meanwhile, it may be asked whether it is desirable that they should have an option not available to private sector employers which effectively allows the Labour Court to "dismiss" employees, a power not conferred anywhere in the LRA"

[24] The suggestion by Grogan is that public sector employers are entitled to override the decision of the internal chairpersons. He makes this suggestion because in his view, contrary to what this Court in *Moloantoa v CCMA and others*[15] held, the decision of *SARS v CCMA and others (Kruger case)*[16] was no longer binding on this Court. He also suggested that the Labour Appeal Court in *Beyers supra* actually overruled *Moloantoa*. Inasmuch as his views on this front are debatable, this Court is in full agreement with his suggestion that public sector employers are better suited by an internal reviewing and overriding of the sanction and when challenged to show exceptional circumstances instead of asking the Labour Court, like the applicant before me, to dismiss employees on its behalf.

Is the decision not to dismiss or better still to impose an irrational employment sanction an administrative action or not?

[25] With respect, in my view, Grogan is right when he opines that the Labour Court is not empowered by the LRA to dismiss an employee on behalf of any employer, public sector employer included[17]. In my respectful view, the monumental error in *Ntshangase*, which was given undue trajectory in *Hendricks v Overstrand Municipality and another*[18] was to conclude that in

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[15](JR 1281-19) 31 May 2021.
[16][2016] 3 BLLR 297 (LAC).
[17] The *SABC and Keevy* judgment.
[18] (2015) 36 ILJ 163 (LAC). Murphy AJA writing for the majority held that 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 [para 27]. Sadly, the learned judge does not seem to back this conclusion with the provisions of the LRA. I suppose this is the reason why

not dismissing, Dorkin *qua* employer took an administrative decision. Clearly, a departure from that point drove the LAC and the SCA to a point that section 33 of the Constitution finds application. I interpose and state that the Constitutional Court has decreed that section 33 of the Constitution is available to private individuals as opposed to the State and its organs. This departure, in my view is the straw that broke the camel's back[19]. At paragraph, 64 of the *Gcaba v Minister of Safety and Security and others*[20] judgment it was said that generally, employment and labour relations issues do not amount to administrative action[21]. Murphy AJA suggested in *Hendricks* that the sentiments echoed by the Constitutional Court should not be given too narrow an interpretation. The departed learned Justice Bosielo AJA reached a conclusion that an administrative action was involved for the following reasons:

> "[12] To my mind, it cannot be argued that the second respondent is not an organ of State as envisaged by s 239 of the Constitution. Furthermore, there is no gainsaying that the second respondent exercises public power in the public interest in terms of legislation. This gives the second respondent's power the necessary public character as opposed to a private character. Undoubtedly, when the second respondent appointed Dorkin to preside over the appellant's disciplinary hearing, it did so in its capacity as the State. It follows, in my view that Dorkin's action complained of herein which essentially is that of the second respondent qualifies as administrative action. That being so, such action has to be lawful, reasonable and procedurally fair as contemplated by s 33 (1) of the Constitution."

Grogan refers to this only available option as a technical answer. Appreciating the difficulty it would seem with a suggestion that administrative law review is the only available option, Murphy AJA continued and stated that "Besides being entitled to bring a review in terms of the common law, as I have explained, the first respondent is entitled to review the decision of the presiding officer on the ground of non-compliance with the constitutional principle of legality." [Para 28].

[19]In my view, the jury is still out with regard to the correctness of *Ntshangase* particularly in seeking to state that an employment matter is an administrative action.

[20][2010] 31 ILJ 296 (CC).

[21]*Hendricks* steadfastly rejected the notion that *Gcaba* overruled *Ntshangase* [para 29]. Reliance was placed on *Khumalo and another v MEC for Education: Kwazulu Natal* [2014] 35 ILJ 613 (CC). *Khumalo* did not deal with the opaque question whether a public sector employer is entitled to review the decision of the presiding officer. It dealt with promotional appointments contrary to the prescripts. It referenced *Ntshangase* when it confirmed the *locus standi* issue. Impliedly it endorsed *Ntshangase* only as far as it dealt with the *locus standi* issue.

[26] It is apparent that what propelled or actuated the above findings is (a) the actor – organ of state; (b) the nature of the action – public one in terms of a legislation and in the public interest; and (c) exercise of public power. Of course, the late Chief Justice Langa in *Chirwa v Transnet Ltd*[22] had already pointed out that the question whether public power was exercised is a "difficult horse" to ride. Other scholars like Hoexter take a different view on the question. Hoexter is critical of the approach taken by the Chief Justice. She argues that in arriving at the conclusion that an act of dismissing a public sector employee is not an exercise of public power, the then Chief Justice relied on a number of factors that have been used by Courts for determining whether a power or function is public.[23] She argues that those factors seem to be applied just as they would be to a completely private entity such as a club or business.[24] Ultimately she argues that because of that, and notwithstanding the detailed and nuanced reasoning of the Chief Justice and the cumulative force of the various features listed by him, she is left with questions, such as given the fact that Transnet would not exist without a statute, does it really matter that a contract happened to intervene in that instance.[25] In addition, given the undoubted status of Transnet, it mattered not that Transnet Pension Fund was not distinctively public. She argued that an organ of state is under a special duty in terms of section 7(2) of the Constitution.

[27] Assuming that the action of Dorkin was not considered to be an administrative action – a better view in my mind – which seem to be congruent with the *Gcaba* judgment and the latest judgments of the Constitutional Court on the non-application of section 33 of the Constitution and PAJA – then *Ntshangase* would not have reached the following conclusion:

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[22] 2008 (3) BCLR 251 (CC).
[23] Hoexter C "*Clearing the Intersection? Administrative law and labour law in the Constitutional Court*" (Juta & Co Ltd, Cape Town, 2008).
[24] Hoexter.
[25] Hoexter.

"[14] ...To my mind, it follows that the decision by Dorkin qualifies as administrative action. However, the vexed legal question remains whether Dorkin's decision is reviewable at the instance of the second respondent or not. If so, is it under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or s 158 (1) (h) of the LRA?

[15] ...Undoubtedly this section [s 158 (1) (h)] provides in explicit terms that a decision like the one taken by Dorkin who acted *qua* his employer can be reviewed on such grounds as are permissible in law..."

[28] Murphy AJA in *Hendricks* reverberated those views by stating that:

"[29] In summary therefore, the Labour Court has the power under section 158 (1) (h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings[26]; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds "permissible in law".

[29] In *Calibre Clinical Consultants (Pty) Ltd and another v NBCRFI and another*[27], Nugent JA, having cited *Hamsphire County Council v Supportways Community Services*[28] with approval reached the following conclusion:

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[26]This is predicated on the views of Claassen J in *Klein v Dainfern College* 2006 (3) SA 73 (T) para 24. Notably, *Ntshangase* omitted to mention this permissible ground. Blieden J in an unreported judgment of *Clive v The President of National Court of Appeal and another* Case 09/2058 distinguished the *Klein* judgment. Klein dealt with a private function as opposed to a public function. However, *Ntshangase* unwaveringly concluded that the action of Dorkin constituted an administrative action hence the need to review. If *Klein* is followed to the latter disciplinary private actions, which are coercive in nature could be reviewed. This will allow contractual reviews under section 158 (1) (h) of the LRA when it is clear that only a State in its capacity as an employer is contemplated.

[27]2010 (5) SA 457 (SCA)

[28][2006] EWCA Civ 1035 (CA)

> "[36] ...I have considerable doubt whether a body can be said to exercise 'public powers' or 'perform public function' only because the public has an interest in the manner in which the powers are exercised or its functions are performed, and I find no support for that approach in other cases in this country and abroad."

[30] It remains an open skeleton in the cupboard that there is sufficient opaqueness involved in deciding what is or is not an administrative action let alone what a public power or function is. I do not venture to enter that debate, it was attempted at various fronts yet harmony remains elusive. If there is a chance that *Ntshangase* was wrong in reaching a conclusion that in not dismissing a public sector employee, a public sector employer through its appointed agents performs an administrative action, then a public sector employer may not invoke the provisions of section 158 (1) (h) of the LRA using the permissible grounds in PAJA. However on the *Klein* approach as endorsed by *Hendricks* perhaps it can be done. Although this Court remains in doubt in view of the latest position of the Constitutional Court as outlined above.

[31] However, the LAC endorsed the view suggested in *Hendricks* in the *Ramonetha v Department of Transport Limpopo and others*[29], case and concluded that a legality review is contemplated in section 158 (1) (h). To my mind, what remains is the question whether it can be safely concluded that in not dismissing an employee, there is an exercise of public power or function involved. A legality review concerns itself with the exercise of public power. Once public power exercise is involved, the barometer is lawfulness and rationality.[30]

[32] To a considerable degree, in my view, the elephant in the room still looms large. A conclusion that not dismissing an employee does not involve an exercise of public power unashamedly dislodges a legality review from the

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[29][2018] 1 BLLR 16 (LAC)
[30]*SITA (SOC) v Gijima Holdings (Pty) Ltd* 2018 (2) BCLR 240 (CC) *and DA v The President of the RSA* 2013 (1) SA 248 (CC).

equation. If this conclusion finds favour, which in my view it should, then section 158 (1) (h) of the LRA should not and cannot be invoked. It may be so that the conduct like the one of Dorkin, although I remain doubtful, snugly fits the administrative action as defined in PAJA.[31] That being a possibility, the jurisdiction of the High Court as opposed to that of the Labour Court may be invoked[32].

[33] Before I conclude, it is befitting to mention that, it does seem that what gives the decision a public character is what *Ntshangase* pointed out as quoted above. The public character is not assumed by the type of decision taken, it would seem. In other words, it does not become a public function when the decision is a dismissal or a no dismissal. Therefore, a dismissal or any disciplinary sanction for that matter effected out of the exercise of public powers must be challengeable under section 158 (1) (h) of the LRA. This Court and the Labour Appeal Court has already rejected the notion that public sector employees have an added string to the bow in order to challenge, as it were, the rationality or legality of their dismissal. However, considering how a public character is assumed as held in *Ntshangase*, there appears to be no valid reason to draw a distinction between a dismissal and a no dismissal where appropriate. As Grogan puts it the fact that public employers cannot appeal the decisions of the internal chairperson, only serve as a technical answer to why the distinction. Once public sector employers begin to override those decisions by internal chairpersons and hope to show exceptional circumstances or fairness for that matter, which this Court believe they can, this Court would see less of these own decision reviews. Those matters would find themselves in this Court in the context of a review in terms of section 145 of the LRA. This, to my mind, is ideal. Perhaps a proper read of the *Beyers* judgment implies that. It remains to be seen that the jurisprudence as developed in this Court would accommodate a new thinking around this issue of review of own sanction by means of section 158 (1) (h) application instead of internal

[31] No. 3 of 2000.
[32] *Bon Accord Environmental Forum v The Department of Mineral Resources: Chief Inspector of Mines and others* [2021] JOL 49770 (LC).

review or override. I have, in this judgment, already embraced it, but my embracement is short-lived by the principle of *stare decisis*.

[34] The conclusion I reach is that the decision to not dismiss is not an administrative action nor is it an exercise of public power within the contemplation of a legality review. However, I remain bound by *Ntshangase* and *Hendricks*. I then have to consider this matter under a legality review as opposed to it being an administrative action despite the character given to these type of matters by *Ntshangase*. It is by now settled law that a review of own decision can only happen under legality review[33]. In precise terms, the Court in *SITA* stated the following:

> "[38] The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for review of its own decision; it simply means that it cannot do so under PAJA[34]. In *Fedsure* this Court said that "[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law" It also said that:
>
> "A local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law..."

[33] *Ibid SITA* fn 15.
[34] Therefore, to the extent that *Ntshangase* held that the decision to impose a lesser sanction amounts to an administrative action, such seem to be at odds with this finding.

[35] What one observes from the above finding is that it seems to be the case that the option of review of domestic tribunals decisions contended for in *Klein* has been left out of account. It is only *Hendricks* that introduced the *Klein* approach into the ambit of section 158 (1) (h) of the LRA since the section is accommodative of any grounds permissible in law. It is worth noting that Claassen J accepted that in *Klein* there was no exercise of public power when Ms Klein was disciplined internally. This is an affirmation of the fact that when an employee is being disciplined even if coercively, there is no exercise of public power.

The grounds punted for by the applicant considered.

[36] It seems so that the applicant contends that the decision reached by itself through its appointed agent is one that is unreasonable and irrational. Thus, the ground pursued is one of reasonableness and irrationality. None of the grounds contemplated in *PAJA* or domestic tribunal reviews contemplated in the *Klein* case have been raised by the applicant in this application.

[37] A decision is unreasonable if no other reasonable decision maker may reach it, as held in the *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others*[35] judgment. With regard to rationality in *Minister of Defence and Military Veterans v Motau*[36] it was said:

> [69] The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given...

[35] 2004 (4) SA 490 (CC).
[36] 2014 (8) BCLR 930 (CC)

[38] In *DA v President of the RSA*[37], Yacoob ADCJ, as he then was, stated the following about rationality:

> [27] The Minister and Mr Simelane accept that the 'executive' is constrained by the principle that [it] may exercise no power and perform no function that conferred... by law and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise, the exercise of the power could be arbitrary and at odds with the Constitution. I agree.

[39] It has been confirmed that rationality and reasonableness are conceptually different. In *Albutt v Center for the Study of Violence and Reconciliation and others*[38], the following was said:

> 'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not; they fall short of the standard demanded by the Constitution.

[40] In *Ntshangase* what propelled or actuated the LAC and the SCA to allow a review was consideration of the gravity of the charges. By implications, if a view is taken that the charges are not grievous, it would not be

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[37] 2013 (1) SA 248 (CC)
[38] 2010 (3) SA 293 (CC)

unreasonable to impose a sanction less than a dismissal. In precise terms the SCA said:

> "[20] I agree that Dorkin's decision, measured against the charges on which he convicted the appellant to be grossly unreasonable. Given the yawning chasm in the sanction imposed by Dorkin and that which a Court would have imposed, the conclusion is inescapable that Dorkin did not apply his mind properly at all to the issue of an appropriate sanction. Manifestly, Dorkin's decision is patently unfair to the second respondent. To my mind, it fails to pass the test of rationality or reasonableness.

[41] Although the charge that led to the impugned sanction did not allege dishonesty, the applicant in its founding papers alleged that an employment relationship has been obliterated beyond repair as a result of Masombuka's act of dishonesty. Which one, I ask? Withal, generally, dishonesty destroys a continuation of an employer and employee relationship. However not all acts of dishonesty justify dismissal[39]. The LAC in *Nedcor Bank (Pty) Ltd v Frank & others*[40] held that dishonesty entails a lack of integrity, particularly willingness to steal, cheat, lie or act fraudulently. Masombuka faced allegations of negligence as opposed to dishonesty.

[42] Nonetheless, owing to the fact that not all dishonesties merit dismissal as a sanction, the question when it comes to reasonableness, is whether the decision of not imposing dismissal as a sanction is so unreasonable to an extent that no other reasonable decision maker may reach it. In labour law, a sanction of dismissal must not just be imposed willy-nilly. It must be fair and appropriate. For instance, item 3 (4) of Schedule 8 provides that generally, it is not appropriate to dismiss an employee for a first offence except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Item 7 (b) (iv) of Schedule

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[39]Item 3 (4) of Schedule 8 of the LRA refers to gross dishonesty as an example of a serious misconduct that will render dismissal an appropriate sanction.
[40](2002) 23 ILJ 1243 (LAC).

8 provides that any person who is determining whether a dismissal for misconduct is unfair should consider whether or not dismissal was an appropriate sanction for the contravention of the rule or standard.

[43] It is noted that the SCA in *Ntshangase* considered the yawning chasm between what the Court would have imposed as a sanction and what Dorkin imposed. Properly considered, the Court (in a section 158 (1) (h) application) on the application of the reasonableness test is posited as a reasonable decision-maker or employer. In other words, the SCA considered what a reasonable employer would have done given the gravity of the charges. As Grogan aptly puts it, favouring the decision of the Court implies that the Court *qua* reasonable employer imposes the sanction. As indicated earlier, this is not even an ideal situation given the constitutional mandate of the Courts.

[44] This difficulty was observed in *Ntshangase*, but an approach used for administrative decisions was endorsed to justify a Court imposing a sanction on behalf of an employer. In my view, the so-called forgone conclusion applies appropriately in administrative decision involving an exercise of public power and not employment matters. It is more apt, in my view, where unlawfulness has been identified[41]. Where an employer does not impose an appropriate sanction, it cannot be said that such an employer is acting unlawfully. A decision not to dismiss where dismissal is appropriate may be set aside, but I have my own doubts whether having done that a Court of law is empowered to act as an employer and impose a sanction. Section 145 (4) of the LRA allows a Court to determine the dispute in the manner it deems appropriate. This type of power seem to be absent in the section 158 (1) (h) review. It is interesting to note that section 8 (1) (c) (ii) (aa) of *PAJA* allows only in exceptional cases the varying and substitution of the administrative action or correcting a defect

[41] See *Maswanganyi v Minister of Defence and Military Veterans and others* 2020 (6) BCLR 657 (CC) where the correct legal position was declared in an instance where section 59 (1) (d) of the Defence Act 42 of 2002 was invoked in the absence of the jurisdictional requirements.

arising from the administrative action. However, I remain bound by the decision of *Ntshangase*. Mercifully, I shall be obliged to traverse that path only if sitting as a reasonable employer I reach a decision that the sanction imposed on behalf of the applicant is unreasonable and irrational. In this matter, I am not reaching that conclusion.

[45] Turning to rationality, *Albutt* decreed that what I assess is whether the means employed – the alternative sanction of final written warning – meets the purpose and the objective of the power endowed. Recently, the Constitutional Court under the hand of Khampepe J in *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Another*[42] had the following to say about rationality:

> "[64] Rationality is concerned with one question: do the means justify the end?

[46] The phrase employed by the Constitutional Court simply means that a desired result is so good or important that any method, even a morally bad one, may be used to achieve it. Rationality is not about this Court liking the alternative sanction or knowing of other alternative "suitable" sanctions. The veritable question is, does imposing a final written warning coupled with the repayment order meet the objectives of disciplining errant employees? The source of the power exercised by Thamaga is the Disciplinary Code set out below. It spells out that the purpose of the Code is amongst others to promote acceptable conduct. One of the stated purposes of the Public Services Act[43] (PSA) is to regulate discipline. Owing to the fact that Thamaga *qua* applicant has a wide discretion to select the means, it is not the place of this Court performing its constitutional mandate to interfere with that selection.

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[42](CCT 131/18) 2019 ZACC 28.

[43] Act 103 of 1994 as amended.

[47] In terms of the Disciplinary Code and Procedures for the Public Service[44], as a principle, discipline is a corrective measure and not a punitive one. In terms of clause 7.4 (a) of the Code, Thamaga *qua* applicant had as available sanctions to impose; (a) counselling; (b) a written warning valid for six months; (c) a final written warning valid for six months; (d) suspension without pay, for no longer than three months; (e) demotion; (f) a combination of the above; or (g) dismissal. Therefore, Thamaga *qua* applicant was legally authorised to impose the sanction of final written warning. The fact that he chose that sanction as opposed to the one notionally wished for does not suggest an irrationality. The issue is appropriateness and fairness as opposed to wishes.

[48] Considering the means as exalted, the sting in the charge Masombuka was found guilty of is that of negligent mismanagement by failing to balance an account. It was never alleged and or proven that Masombuka stole the money in question nor did she act fraudulently and or dishonestly. The loss arose because of her negligent mismanagement and not her dishonesty that was never alleged or proven. The term mismanage literally means doing something badly or wrongly. Fortunately, in the charge, the applicant outlined that something to be the balancing of an account. Thus, Masombuka wrongly or badly balanced the account. Of importance, she did not do that deliberately. Negligence means failing to take proper care over something.

[49] Consequently, the sanction of final written warning coupled with the recovery order is appropriate for the charge of negligent mismanagement. It serves the purpose of discipline, promotion of acceptable behaviour and correction of behaviour, all of which are in line with the basic values and principles governing public administration as outlined in section 195 of the Constitution. As a parting shot, section 195 (1) (h) provides that good human-resource management and career development practices to maximize human potential must be cultivated is one of the democratic

[44]Resolution 1 of 2003.

values and principles. Thus, progressive discipline as a labour law concept is not an outlier nor is it obliquely juxtaposed to the principle.

[50] In the results, the following order is made:

Order

1. The application to review is dismissed.
2. There is no order as to costs.

Nasious Moshoana
Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr M Rantho

Instructed by: State Attorney, Pretoria

For the 2nd Respondent: Mr B Luthuli of Bongani Khanyile Attorneys, Johannesburg.