REPORTABLE
Case number: 229/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

J W MAMABOLO **APPELLANT**

and

RUSTENBURG REGIONAL LOCAL COUNCIL **RESPONDENT**

CORAM: VIVIER, MARAIS JJA and MTHIYANE AJA

DATE OF HEARING: 4 SEPTEMBER 2000

DELIVERY DATE: 26 SEPTEMBER 2000

Review - Undue delay - applicable principles
- Rules of natural justice -Procedural fairness - compliance therewith - i r o termination of employment

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JUDGMENT

MTHIYANE AJA

MTHIYANE AJA:

[1] On 16 May 1995 the appellant was appointed by the respondent ("the Council") as an RDP Director. The appointment was subject to a probationary period of six months. That period expired on 15 November 1995, but on 28 November 1995 the Council resolved to extend it for a further six months. On 11 March 1996 the appellant requested reasons for the extension and recorded (in a memorandum submitted to the Council) that he was reserving "his rights until such time as . . . [he had] . . . had the opportunity of studying the [said] reasons." In its response on 19 March 1996 the Council recorded that the reasons had been discussed with him on 21 December 1995. The Council nevertheless furnished the appellant with the reasons for

the extension of his probation. On 14 May 1996 the Council resolved not to confirm the appellant's appointment but to dismiss him, giving him one month's notice from 16 May 1996.

[2] The appellant's appointment was governed by clause 6.2.7 of Regulation No R 1828 promulgated on 28 October 1994 under Government Notice No 16047. The promulgation was in terms of s 48(1)(a) of the Labour Relations Act 28 of 1956. Clause 6.2.7 reads as follows:

> "The Council may appoint a permanent employee on probation for a fixed period not exceeding six months, subject to the following conditions:
>
> 6.2.7.1 If the council is of the opinion that such employee has successfully completed his probationary period, the council shall confirm such employee's appointment in writing.
>
> 6.2.7.2 If the council, on or before the date of completion of the probationary period of such employee, is of the opinion that he is not fit for the post occupied by him, the council may–
>
> 6.2.7.2.1 in writing and stating the reasons therefor, extend the probationary period of such

exceeding six months; or

6.2.7.2.2 give such employee at least one working month's written notice that his services will be terminated on a specific date: Provided that a fair procedure has been followed."

[3] On 23 August 1996 the appellant instituted review proceedings in the Transvaal Provincial Division. He sought orders setting aside, first, the decision to place him on probation for six months, secondly, the resolution to extend his probation for a further six months, and thirdly, the resolution to terminate his services.

[4] When the matter came before Kirk-Cohen J, the learned judge rejected the argument that the appellant had not been appointed subject to a probationary period of six months. In my view the point was doomed to fail the moment it was made. The appendix to the appellant's letter of appointment, the receipt of which he acknowledged and accepted on 23 May 1995, contains the following:

"1. Your appointment as a permanent employee is subject to the successful completion of a probationary period of six months,

six months."

That was in accordance with a long standing policy of the Council to make all such appointments probationary. Accordingly, the application for the first order was correctly dismissed.

[5] The learned judge also rejected a contention that there had been undue delay in reviewing the second resolution and that the application should be dismissed on that ground alone in so far as it related to that resolution. He granted the appellant an order setting aside both the resolution of the Council to extend the probationary period, and the resolution to terminate his services. Leave was granted to the Council to appeal to the Full Bench. On appeal the Full Bench found in the Council's favour, on the sole ground that there had been an unreasonable delay on the part of the appellant in bringing the review application. This appeal is against the judgment of the Full Bench with special leave granted by this Court.

in bringing the review application; whether the Council was entitled to extend

the appellant's probationary period for six months; and whether the appellant's employment was validly terminated. We were also asked to deal with a preliminary point taken on behalf of the Council which is to the following effect: Because the appellant has without explanation omitted to file with the Registrar of this Court a full record as required by the rules of this Court, the appeal should be dismissed or removed from the roll solely on that score. What has been omitted is the full record of the proceedings sought to be set aside, which was filed by the Council pursuant to Rule 53(1)(b) of the Uniform Rules of Court.

[7] I propose to dispose of the preliminary point first. It is true that in terms of the rules of this Court the appeal lapses if an appellant fails to lodge a proper record within the prescribed period or within an extended period. (SCA Rule 8(3); *Court v Standard Bank of South Africa Ltd; Court v Bester NO and Others* 1995(3) SA 123 (A) at 139 G-H.) However, I do not think that in *casu* there has been such breach of

the rules, as to lead to the conclusion that the appeal is to be regarded as having lapsed, or that it falls to be dismissed or struck from the roll. All the relevant and necessary documents for consideration of the appeal are before us, and we have not been hampered in dealing with the matter by the absence of the other documents. Nor has any prejudice been shown to have been suffered by the Council in the conduct of its case on appeal. In my view the preliminary point should not be upheld.

[8] I return to the main issues. First, the question of undue delay in instituting review proceedings to set aside the resolution extending the appellant's probationary period. As I see it, this question had been overtaken by a rather more fundamental question, namely, whether the issue of whether or not the resolution should stand had become moot and therefore no longer justiciable. By the time the decision was taken to dismiss the appellant, the extended probationary period had been served in full so that, viewed in isolation, the setting aside of the resolution extending the period

would have been an empty gesture devoid of any practical significance. The claim to set aside that particular resolution had by then become academic. Similarly, the contention that there had been unreasonable delay in attacking that resolution had become equally academic and no longer required consideration by the Courts below. The legitimacy of the extension as an abstract matter of law was not of course necessarily rendered entirely irrelevant thereby for it might yet have had a bearing upon the legality of the third resolution dismissing the appellant. Whether it did indeed have such a bearing is a question to which I shall return.

[9] As to undue delay in attacking the resolution of 14 May 1996 terminating the appellant's services, it was not the Council's case that there was a delay in the launching of an application to set aside *that* resolution. The delay point in that particular regard was raised by the Court *a quo mero motu* and it found against the appellant solely on the ground that there had been unreasonable delay. I am unable

to agree with either the finding or the manner in which it was reached.

[10] The appellant was notified on 14 May 1996 that his services were being terminated on one month's notice from 16 May 1996. The review application was launched on 23 August 1996, some two months and one week from the date on which the termination of service would take effect. That is not, in my view, a delay of such magnitude that it called for an explanation from the appellant in anticipation of delay being raised as a bar to his claim by either the Council or the Court. The Council did not see fit to raise it and the affidavits filed are understandably silent in that regard. While it is open to a court to raise the issue of delay *mero motu*, it should not lightly do so where a respondent specifically abstains from doing so, for, unbeknown to the court, there may be good reasons why the respondent has so abstained. There may even be reasons which neither party wishes to disclose to the court, for example, that there have been protracted settlement negotiations. Where, despite that, a court

wishes to raise the point, the least it should do is give an applicant an opportunity to supplement the affidavits in order to deal specifically with the apparent delay. Cf *Scott and Others v Hanekom and Others* 1980(3) SA 1182 (C) at 1192 E - 1194 A. In my view the conclusion to which the Court *a quo* came cannot be justified.

[11] I should add that even if it had correctly found that the review proceedings had been instituted after the lapse of a reasonable period of time, that was not necessarily the end of the matter. The Court was obliged to consider whether the delay should be condoned. See *Wolgroeiers Afslaers (Edms) Beperk v Munisipaliteit van Kaapstad* 1978(1) SA 13 (A) at 39 C-D; *Setsokosane Busdiens (Edms) Beperk v Voorsitter Nasionale Vervoerkommissie en 'n Ander* 1986(2) SA 57 (A) at 86 C-E. There is no indication in the judgment of the Court *a quo* that it did so. On any view of the matter, its decision cannot be allowed to stand.

[12] In the Court of first instance Kirk-Cohen J concluded that the resolution

extending the probationary period was *ultra vires*. He considered that once he set it aside, as he intended to do, it would follow inexorably that the resolution terminating the appellant's services would also have to be set aside because it was taken after the first probationary period had expired, and his reading of the relevant regulation was that, in order to be *intra vires*, the forming of the opinion therein described and the decision to terminate the appellant's services had to be taken before the expiry of that period. He therefore found it to be unnecessary to consider whether or not the procedure followed was fair or not.

[13] In as much as I have concluded that the learned judge should not have set aside the resolution extending the probationary period, and that it has to be regarded as being operative when the decision to terminate the appellant's services was taken on 14 May 1996, the basis for his conclusion falls away. As Corbett J (as he then was) observed in *Harnaker v Minister of the Interior* 1965(1) SA 372 (C) at 381 A-C, the

successful invocation of the delay principle in review proceedings would in a sense "validate" what would otherwise have been an *ultra vires* act and therefore a nullity. *A fortiori* is that so, in my opinion, where the delay has actually rendered the validity or invalidity of the act moot. It is therefore necessary to consider the merits of appellant's attack upon the third resolution.

[14] The appellant argues that because he had by 28 November 1995 successfully completed his probationary period, the Council was no longer entitled to extend the probationary period. If the Council wished to extend his probation, so the argument goes, it had to do so "on or before the date of completion of the probationary period". At the completion of the probationary period, the appellant became a permanent employee notwithstanding the absence of confirmation thereof in writing. The appellant seeks to overcome the absence in the regulations of any support for the proposition that on completion of probation he automatically became a permanent

employee, by contending that he became an "employee" under the Labour Relations Act 66 of 1965 (LRA).

[15] This argument is flawed. The whole basis of employment of the appellant was that he was required to serve a probationary period of six months, and that at the end of that period, if the Council wished to appoint him, his permanent employment had to be confirmed (in writing). A failure to confirm such appointment or the mere expiry of the probationary period would not mean that the appellant would automatically become a permanent employee. It was never the appellant's case in the Courts below that there was an implied confirmation by conduct of his employment, nor was implied confirmation ever relied upon at any stage.

[16] The argument advanced by the appellant carries within itself the seeds of its own destruction. If the extension on 28 November 1995 was invalid, he was then no longer a permanent employee (in the absence of any confirmation either in writing or

at all) and an order setting aside the resolution terminating his services would not have had the effect of securing his post. It would mean that, the Council having failed to avail itself of its right to extend the period "on or before the expiry of the probationary period", but having declined to confirm him in his position, the appellant was no longer an employee. The position contended for by counsel for the appellant to the effect that the appellant should, in the absence of confirmation, be considered to be an employee by virtue of the LRA, is an afterthought. It was never part of the appellant's case that such was his status. None of the Courts below considered the point and it is not open to the appellant to raise it at this stage, especially when the proposition flies in the face of his case as presented in the affidavits.

[17] There is yet another ground on which I consider that the appellant should fail on this point. The resolution to extend the appellant's probation was taken on 28

November 1995. On 21 December 1995 he was informed verbally of the reasons for such extension. Apart from his belated request for reasons on 11 March 1996 the appellant allowed the second probationary period to run its full course. If the appellant did not subjectively acquiesce in the extension, at the very least, he led the Council to believe that he had accepted the extension and it accordingly proceeded to deal with him on that basis. I do not believe that the appellant can now be heard to contend the contrary. The attack upon the Council's right to extend fails.

[18] I turn to the final aspect of whether the appellant's employment was validly terminated. The appellant's complaint is that the resolution to terminate his employment was ". . . procedurally unfair. . ." and did not comply ". . .with the rules of natural justice."

[19] I shall assume in favour of the appellant that on 14 June 1996 he was a permanent employee on probation. On 14 May 1996 the appellant was called to the

Council's chamber where the Mayor informed him that the Executive Committee (Exco) had recommended that his permanent appointment not be confirmed and that his services be terminated as from 16 May 1996. The Mayor then invited the appellant "to address the Council regarding the recommendations of Exco before the Council debates on the matter." The appellant was further informed that if he needed more time to prepare his response he could address the Council with or without a representative on 28 May 1996. The Mayor informed the appellant that the Council was technically bound to take the decision on that day (i e 14 May 1996). (That was because the Council had been advised, rightly or wrongly, that a decision either confirming or terminating his appointment had to be taken before the expiry of the extended probationary period.) He was, however, assured that the Council would keep an open mind on the matter, and if he chose to make his representations on 28 May 1996, the appellant was at liberty to do so, with or without a legal representative,

to request the Council to review its decision. The appellant requested time to study the recommendation and to address the Council on 28 May 1996. He was thus excused from the Chamber and a resolution was adopted to the effect that this permanent appointment not be confirmed and that his services be terminated on one month's notice as from 16 May 1996.

[20] The appellant's main complaint seems to be that when he was invited to make representations on 28 May 1996, a decision had already been taken to dismiss him. As a general proposition the expectation of procedural fairness gives rise to a duty upon the decision maker to afford the affected party an opportunity to be heard before a decision is taken which adversely affects his rights, interests or legitimate expectations and a failure to observe this rule would lead to invalidity - Baxter - *Administrative Law* 3rd ed at 587. This Court has said that a right to be heard after the event, when a decision has been taken, is seldom an adequate substitute for a right to

be heard before the decision is taken *Attorney-General, Eastern Cape v Blom and Others* 1988(4) SA 645 (A) at 668 D.

[21] I am entirely in agreement with the dictum in the *Blom* case (*supra*). However this case stands on a different footing. The decision taken on 14 May 1996 was in substance provisional and not final. This was made clear to the appellant and that is why he was invited to address the Council on 28 May 1996, if he so wished. Besides, the decision to consider the confirmation or termination of his appointment is not something that was suddenly sprung upon him; he knew that at the end of his probationary period this issue would arise. He would have applied his mind to it and, if so advised, would have even sought legal assistance.

[22] On 28 May 1996 the appellant and his attorney were afforded an opportunity address the Council on the issue. Instead of dealing with the merits of the termination the attorney chose to confine himself to technicalities. Significantly, neither the

appellant nor his attorney complain that they were not afforded an opportunity to be heard, nor do they say that the opportunity afforded them was insufficient. There is nothing on the record to show that had the attorney asked for more time, this would not have been granted. In any event the appellant was still in employment and his termination would have taken effect only on 13 June 1996. Having declined the opportunity to address the Council on the merits of his dismissal, I do not think that it is open to the appellant to complain at this point that the rules of natural justice were not complied with.

[23] I also do not think that this is a case where a hearing was denied before the decision was taken. Perhaps in form, but not in substance. In any event, I do not think that the actions of the Council offended the rules of natural justice. In certain instances a court may accept as sufficient compliance with the rules of natural justice a hearing held after the decision has been taken, where:

"( ) there is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing;

( ) the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and

( ) the affected individual has not thereby suffered prejudice." Baxter *op cit* at 588.

[24] In *casu* the decision to terminate the appellant's services was taken on 14 May 1996 and would have taken effect only on 13 June 1996. The Mayor made it clear to the appellant that the Council was keeping an open mind on the issue. The Council appears to have demonstrated this open mindedness by inviting the appellant to address it on 28 May 1996 with a view to reconsidering its decision.

[25] In my view there was a valid termination of the appellant's employment.

The appeal is accordingly dismissed with costs.

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K K MTHIYANE
ACTING JUDGE OF APPEAL

VIVIER JA)Concur

MARAIS JA)