THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 478/03
Reportable

In the matter between

THE MEC: DEPARTMENT OF FINANCE, ECONOMIC

AFFAIRS AND TOURISM:

NORTHERN PROVINCE **APPELLANT**

and

SCHOON GODWILLY MAHUMANI **RESPONDENT**

CORAM: Streicher, Navsa, JJA and Jafta, Patel, Ponnan AJJA

HEARD: 8 November 2004

DELIVERED: 30 November 2004

Summary: ***Presiding officer at disciplinary hearing of public servant- vested with discretion to grant legal representation in terms of clause 7(3)e of the Disciplinary Code applicable to public servants.***

JUDGMENT

PATEL AJA/…

PATEL AJA:

[1] The appellant, the MEC for Finance, Economic Affairs and Tourism, with leave of the Johannesburg High Court, appeals against the finding by that court that the respondent, Mr S G Mahumani, was entitled to be legally represented at a disciplinary hearing.

[2] The respondent was employed by the Department of Finance, Economic Affairs and Tourism, as a game reserve manager at the Andover Game Park, Northern Province. On 4 June 2003 he was suspended from his position on the ground, inter alia, that he was implicated in the theft and disposal of five rhinoceroses from the reserve. The appellant in due course initiated a disciplinary enquiry against the respondent for misconduct. This enquiry was to take place before, Mr N S Ratlabala ('the presiding officer'), the second respondent in the court below.

[3] At the commencement of the disciplinary hearing, the respondent requested permission to be legally represented at the hearing. The presiding officer did not accede to this request. His refusal was premised on clause 7.3(e) of the Disciplinary Code and Procedures for the Public Service ('the Code') embodied in Resolution No 2 of 1999 of the Public Service Co-ordinating Bargaining Council which reads:

> 'In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner, unless the employee is a legal practitioner. For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practise as an advocate or an attorney in South Africa.'

Through collective bargaining in the Public Service Co-ordinating Bargaining Council, the Code was agreed upon by the employer and employee representatives in the public service. In terms of s23 of the Labour Relations Act 66 of 1995 ('the LRA'), it became a legally binding

collective agreement and governed the disciplinary hearing of the respondent.

[4] The presiding officer was of the view that s 7.3(e) did not repose in him a discretion to grant legal representation. He was fortified, he believed, in this view, by the decision of Wallis AJ in the case of *Mosena and others v The Premier: Northern Province and Others* case no 1401/ 2000 an unreported judgement of the Labour Court.

[5] The respondent, not content with this ruling, brought an application in the Johannesburg High Court to review and set aside the ruling of the presiding officer. Pending that review application, the respondent launched an urgent application to stay the disciplinary hearing. At the hearing of that application, the parties agreed not to proceed with the disciplinary enquiry until the finalisation of the review application. The

costs of that application were reserved for determination at the hearing of the review application.

[6] The presiding officer's decision was reviewed and set aside by the court *a quo.* It held that the respondent was entitled to be legally represented at the disciplinary hearing and made the following order:

> '(1) The decision of the second respondent that the applicant is not entitled to legal representation at the disciplinary enquiry is set aside.
>
> (2) The applicant is permitted to be legally represented at the disciplinary enquiry.
>
> (3) That the respondents are to pay the costs of this review application jointly and severally.
>
> (4) The respondents are also to pay the reserved costs, jointly and severally, of the application under case no 22171/2002 (per orders of court of 15 August 2002 paragraph 5) and of 22 August 2002 (paragraph 6).'

[7] Before us counsel for the appellant submitted that clause 7.3(e) of the Code in express terms, excludes outside legal representation and that it was not susceptible to an interpretation vesting a discretion in the presiding officer to allow legal representation at a disciplinary hearing. In this regard they relied on the judgment by Wallis AJ in the *Mosena* case.

[8] Clause 2 of the Code provides:

> '2 The following principles inform the Code and Procedure and must inform any decision to discipline an employee.
>
> 2.1 Discipline is a corrective measure and not a punitive one.
>
> 2.2 Discipline must be applied in a prompt, fair, consistent and progressive manner.
>
> 2.3 Discipline is a management function.
>
> 2.4 A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:
>
> a. have a fair hearing in a formal or informal setting;
>
> b. are timeously informed of allegations of misconduct made against them;

c. receive written reasons for a decision taken; and

d. have the right to appeal against any decision.

2.5 As far as possible, disciplinary procedures shall take place in the place of work and be understandable to all employees.

2.6 If an employee commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings.

2.7 Disciplinary proceedings do not replace or seek to imitate court proceedings.

2.8 The Code and Procedures are guidelines and may be departed from in appropriate circumstances.'

[9] In the *Mosena* case it was submitted that, in the light of clause 2.8, clause 7.3(e) of the Code should not be construed as an absolute prohibition against legal representation at a disciplinary hearing. Wallis AJ held that clause 2.8 is an injunction in regard to an employer's general approach to discipline and should not be interpreted as authorising

wholesale discretionary departures from the Code and procedures. It should be interpreted to only authorise departures where it would be necessary by agreement or otherwise, to depart in some respect from the strict terms of the procedure. He found in clause 2.7, which provides that disciplinary proceedings do not replace or imitate court proceedings, a strong indication that the parties considered clause 7.3(e) to be a fundamentally important portion of their agreement.

[10] I agree with Wallis AJ that clause 2.8 is an injunction as to the general approach that should be followed. I, furthermore agree, that clause 7.3(e) is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation (see *Hamata and Another v Chairperson, Peninsula Technickon Internal Discplinary Committe, and Others* 2002 (5) SA 449 (SCA) at paras 12 and 13).

[11] In terms of our common law a person does not have an absolute right to be legally represented before tribunals other than courts of law (*Dabner v SA Railways and Harbours* 1920 AD 583 at 598; and *Hamata* at para 5). However, it does require disciplinary proceedings to be fair and if 'in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion' (per Marais JA in *Hamata* at para 23). The provisions of the Promotion of Adminstrative Justice Act 3 of 2000 in respect of administrative action in general corresponds with the common law in respect of disciplinary proceedings. Sections 3(1) and (3) reads as follows:

'3(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

3(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.'

In *Hamata* (at para 23) Marais JA found it unnecessary to decide whether the bodies concerned were engaging in 'administrative action'. In the present case it is similarly unnecessary to do so as it would make no difference to the outcome of the matter.

[12] The parties, who agreed on the Code, were intent on devising a fair procedure (see clause 2.4) and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they

would have intended the presiding officer to have a discretion to allow legal representation in circumstances in which it would be unfair not to do so. I can find no indication in the Code to the contrary. There is, therefore, no justification for interpreting 'appropriate circumstances' in clause 2.8 so as not to include circumstances, which would render it unfair not to allow legal representation at a disciplinary enquiry.

[13] It follows that, if, on a conspectus of all the circumstances it would be unfair not to allow legal representation the provisions of clause 7.3(e) may in terms of clause 2.8 be departed from. The presiding officer erred in holding that he had no discretion to allow such a departure. The court *a quo*, therefore, correctly reviewed his decision and set it aside.

[14] In the face of the failure by the presiding officer to exercise the discretion which he had, this matter has to be referred back to him for consideration. It is not for this court to exercise the discretion which is reposited in the presiding officer unless there are good reasons for doing so (see eg *UWC and Others v MEC for Health and Social Services and others* 1998 (3) SA 124 (C) at 130J-131H). Counsel for the respondent was not able to advance any good reasons other than to contend that the respondent would be prejudiced by the delay occasioned by the referral back to the presiding officer. Delay is a consideration to be taken into account, but on the papers before us, there is insufficient information upon which to exercise the discretion as to whether the circumstances of the matter warrant a departure from the provisions of clause 7.3(e). Although not a *numerus clausus*, this court in the *Hamata* case (at para

[21]) set out some of the factors which may be taken into consideration in the exercise of such a discretion, namely: the nature of the charges brought; the degree of factual or legal complexity attendant upon considering the charges; potential seriousness of the consequences of an adverse finding and the nature of the prejudice to the employer in permitting legal representation.

[15] It will be for the presiding officer to apply his mind to the need for legal representation after considering the circumstances of the case. The matter therefore will of necessity have to be referred to the presiding officer for him to exercise his discretion.

[16] I turn now to deal with the question of costs. Both parties achieved a measure of success. It would, therefore, satisfy the dictates of justice if both parties were ordered to bear their own legal costs in respect of the review application in the court below and of this appeal ie if no order as to costs is made in respect of the review application and this appeal.

[17] It was not disputed by the appellant that, in the absence of an undertaking from the appellant, the interdict application was necessary in order to stop the disciplinary hearing from proceeding. It is only fair that the appellant be ordered to pay all costs consequent upon the bringing of the interdict application.

[18] The following order is made:

1. Save as is stated below, the appeal is dismissed.

2. Paragraphs 2 and 3 of the order granted by the court *a quo* are set aside and replaced by the following order:

'2. The matter is referred back to the officer presiding at the disciplinary enquiry of the applicant to exercise his discretion whether the applicant is entitled to legal representation at his reconvened disciplinary hearing.'

……..
CN PATEL
Acting Judge of Appeal

Concur:
Streicher JA
Navsa JA
Jafta AJA
Ponnan AJA