

IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: 35784/2010

DATE: 7/4/11

In the matter between:

SAMUKELO NGUBANE

DELETE WHICHEVER	APPLICABLE
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED.	
DATE: 5 April 2011	SIGNATURE: L. Webster
	Applicant

THE DEPARTMENT OF CO-OPERATE GOVERNANCE AND
TRADITIONAL AFFAIRS

First Respondent

THE CHAIRPERSON OF THE DISCIPLINARY HEARING
MR MPHONG MAKORO

Second Respondent

JUDGMENT

WEBSTER J

1. On 24 March, 2011, I confirmed an interim order granted by Tolmay J with costs. I undertook to provide my reasons therefor in due course. Such reasons are set out below.
2. This is the return date of a *rule nisi*.
3. The applicant, an employee of the first respondent was summoned to appear before a disciplinary committee of the first respondent on 28 June, 2010. It appears from the papers that this was not his first appearance, the matter having been postponed on three (3)

previous occasions viz., 24, 25 and 26 March 2010 when he had been represented by an Attorney. The matter was further postponed to 8, 9 and 10 May, 2010. The disciplinary committee ultimately reconvened on 8 June, 2010: the matter was, however, again postponed to 28 and 29 June, 2010.

4. On 28 June, 2010, senior counsel representing the applicant moved for a further postponement of the proceedings as the applicant intended to pursue the appeal process provided for in section 74 of the Promotion of Access to Information Act 2 of 2000. The application was refused but postponed to the next day. The applicant moved this application on 28 June, 2010, for urgent relief in the following terms:

"1. That a rule nisi be issued returnable on 3 August, 2010 at 10h00 where the respondents are called upon to appear and show cause why an order should not be granted in the following terms:

- 1.1 That the order made by the Second Respondent on Monday 28 June 2010 in the disciplinary hearing of the applicant, to the effect that the postponement sought by the applicant be refused and the proceedings against him would re-commence on Tuesday 29 June 2010 at 09h00 be reviewed and set aside.*
- 1.2 That the disciplinary proceedings set down for 29 June 2010 at 09h00 be postponed sine die pending the outcome of the applicant's appeal in terms of the Promotion of Access to Information Act no 2 of 2000 and any other application that he may be advised to bring pursuant thereto.*
- 1.3 That the first respondent be ordered to pay the costs occasioned by the postponement jointly with the second*

respondent insofar as the second respondent may oppose this application."

5. The court has been advised by both counsel that the return date was extended to today.
6. The applicant avers that after the previous postponements he was informed on 1 March, 2010 of the date of hearing of the matter. This was shortly after about 900 pages of documents were provided to him a few days before the 28th June 2010. Various problems arose from the contents of the documents. Documents purported to have been written by the same author differed; the signature of the author appeared to have been forged, a certain report was defective and incomplete, many of the documents were either computer-generated and bore no signatures or they were signed by some person but not the applicant. It has been further averred that the 900 pages "...were a nightmare to go through" for various reasons.
7. The applicant deals further with the documents namely Annexures "SN14" and "SN16". Both purport to be one and the same letter. The second page, of "SN16", however, differs radically from that in "SN14". In "SN16" an entire paragraph itemising "Current projects already underway are as follows" are omitted. The signatures on the two letters differ materially even to an untrained eye.
8. The issue of the above documents was raised when the postponement was sought. The second respondent, in his ruling, did not allude to them.
9. The respondent raised the points *in limine*, namely (i) that the application is now of academic interest, the respondent having

responded to the applicant's appeal in terms of PAJA; (ii) the respondent having "furnished and made available all the relevant documents in its possession and/or control which the applicant requires for the purpose of the disciplinary enquiry"; and (iii) the application having "...been overtaken by material events".

10. With regards to the merits, the respondent's case is that the applicant failed to make out a case for the relief sought. When the matter was called up in court the respondent's counsel sought leave to hand up what was termed supplementary heads of argument. These heads introduced a new angle, if I may so refer to them, to the issue viz. that the "...order to grant or refuse a postponement has no external legal effect towards the applicant's rights during the disciplinary hearing and as such, is not an administrative action subject to review under PAJA in the High Court.
11. In the light of the view I take in this matter it will not be necessary to examine and comment on each of the issues raised in this matter. It was common cause that there was no "summons" for the lack of a better word, ever placed before the Chairperson of the disciplinary hearing at any stage of the proceedings. It was further common cause that documents were pivotal to the enquiry. What has already been alluded to with regard to Annexures "SN14" and "SN16" and especially their glaring inconsistencies and the contradiction that there were no further documents in the respondent's possession and yet a vast volume of documents were subsequently delivered to the applicant subsequently were sufficiently serious to cause great apprehension in the applicant's mind with regard to the fairness of the proposed proceedings.
12. Annexures "SN14" and "SN16", by way of illustration, would, in all probability, require evidence on (i) the authenticity of signatures

thereto; (ii) the identity or identities of the signatures; (iii) an explanation as to the incorporation or omission of information in one of the two letters. The observation or ruling by the Chairperson that no documents that had not been discovered could be used or relied upon in the proceedings, could have been of little or no comfort to the applicant as the probability that some of those documents not discovered may be vital in presenting the respondent's case or refuting allegations made against him. Further, the production of a large volume of documents when it had been alleged that none were available goes to the core of the appeal contemplated or already lodged by the applicant in terms of PAJA.

13. With regard to the points raised *in limine*, my views are as follows:
 - (i) the applicant states clearly in his replying affidavit that "...until such time as I have exhausted all my remedies, or the first respondent has finally decided to comply with the relevant notices to produce documents, the disciplinary hearing cannot proceed (Paragraph 8.2 at page 231);
 - (ii) the applicant further avers that he has instructed his attorneys to institute the proceedings to stay the disciplinary inquiry; and consequently that there is no purpose in setting down the disciplinary hearing until the said stay of proceedings has been adjudicated upon and finalised.
14. I am in agreement with what has been stated above. The applicant is entitled to a hearing that is both procedurally and substantively fair. That is a fundamental principle of PAJA.
15. The respondent's submission that the applicant failed to make out a case for the relief sought is based on the allegation that "... a party is not entitled to review a decision merely because such a decision

is not in such party's favour. I submit that there should be factual and legal basis upon which such a review is premised in order to entitle a party such as the applicant [to] the relief it seeks" (Page 82 Paragraph 11). The answer to this is short: "(R)ules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts" (Per van Winsen AJA in Federated Trust Ltd v Botha 1978(3) SA 645 (A) at 654 C – D). It is preposterous to argue that the applicant should have proceeded with the disciplinary inquiry and, if aggrieved at the conclusion thereof, to raise all such points as he has done thus far.

16. I turn now to consider the "Supplementary Heads of Argument". The fundamental point made in the argument is that this matter falls under the provisions of the Labour Relations Act and therefore the court having sole jurisdiction in the matter is the Labour Court in terms of the provisions of section 157 of Act 66 of 1995. Whatever the argument was intended in regard to this point I can find nothing in the papers to suggest that "If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the Labour Relations Act, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction" (Gcaba v Minister of Safety and Security 2010(1) SA 238 at 263F). Respondent's counsel, when invited to take the court to the source for the basis of the submission was unable to do so.
17. The second point is whether a proper case for the reviewing and setting aside of the second respondent has been made. The applicant has disclosed in that he has instructed those representing him to pursue this – hence the order by Tolmay J. It will be premature in my view to comment on the merits of the appeal in

terms of PAJA as set out in paragraph 1.2 of the order referred to above.

18. The issues in this matter were sufficiently serious for both parties to make use of senior counsel. Whilst the matter is not particularly complex it is my considered view that the use of silk was justified.

19. It is accordingly ordered that the costs of a silk be allowed.



G. WEBSTER
JUDGE IN THE HIGH COURT

Date of hearing	:	18 March 2010
Counsel for the Applicant	:	Adv B Neukircher SC
Counsel for the Respondents	:	Adv L Nkosi Thomas SC
		Adv N Manaka