

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA IN THE HIGH COURT OF SOUTH AFRICA

(Noord-Kaapse Afdeling / Northern Cape Division)

478/03

22/08/03

Saakno: / Case number:

Datum verhoor: / Date heard:

Datum gelewer: / Date delivered: **5/9/03**

In the matter:

BULA, RLN

Applicant

versus

AKHARWARAY, GH: MEC OF FINANCE

1st Respondent

**DIPICO, EM: PREMIER
Respondent**

2nd

THE NORTHERN CAPE GOVERNMENT

3rd Respondent

Coram: Lacock J

JUDGEMENT

LACOCK J:

1] What induced this application is to a large extent common cause:

[1.1] The applicant, the Head of the Department of Safety and Liaison in the Provincial Government of the Northern Cape, was found guilty on four charges of sexual harassment towards female employees of the Provincial Government in a disciplinary hearing during May 2002.

[1.2] It was recommended by the Chairperson of the disciplinary tribunal, one advocate Halgryn that the applicant be dismissed from public service.

Following the aforesaid recommendation, the applicant was dismissed from public service by the second respondent, the Premier of the Northern Cape on 5 November 2002.

[1.3] The aforesaid disciplinary action was taken and purportedly conducted in accordance with the Disciplinary Code and Procedures for the Public Service adopted by the Public Service Co-ordinating Bargaining Council in terms of Resolution 2 of 1999 (the Code). I use the word purportedly since the applicant avers that the prescribed procedures were not properly adhered to by the disciplinary tribunal.

[1.4] The applicant appealed against the aforesaid ruling of the disciplinary tribunal in accordance with the relevant provisions of the Code.

Paragraph 8.4 of the Code provides that *“if the employee is a Head of Department, the relevant Premier or the President will consider the appeal”*.

[1.5] In a letter dated 8 May 2003 the Chief State Law Adviser in the Office of the second respondent advised the applicant that the second respondent delegated his authority to hear the appeal to the first respondent, the Member of the Executive Council: Finance, Northern Cape Government. The applicant was advised that this delegation of authority was exercised in terms of sec 3 B(4)(b) of the Public Service Act of 1994.

2] The applicant, not content with the aforesaid decision of the second respondent, lodged the present application whereby the following relief is claimed:

2. *That a rule nisi be issued, calling upon respondents to show cause, if any, on **FRIDAY, 1 AUGUST 2003 at 09H30** why the following orders should not be made:*

2.1 *That the first respondent be interdicted from acting as appeal authority and from pronouncing any judgment in the appeal of applicant against the findings of advocate Leon Halgryn.*

2.2 *That the second respondent’s delegation of authority in terms*

whereof first respondent was appointed as appeal authority in the above appeal of applicant, be reviewed and set aside.

2.3 That second respondent be authorized and ordered to appoint a retired judge or senior advocate in co-operation and with written approval of applicant to act as appeal authority and to pronounce judgment on the appeal lodged by applicant referred to above.

2.4 That the second and third respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

2.5 Further and/or alternative relief.

3. That the relief set out in prayer 2.1 above, shall operate as an interim interdict with immediate effect pending the finalization of this application including the application for review.”

3] In a supplementary affidavit, the applicant avers that the parties concluded an agreement on 29 May 2003 in terms whereof the respondents consented to prayers 2.1 to 2.3 of the notice of motion, and now requests the court to grant him the aforesaid relief on the strength of that agreement.

4] It appears to me that the logical point of departure to resolve this matter will be the alleged agreement referred to above.

[4.1] The respondents deny that a final agreement had been concluded between the parties. In this regard Mr Groenewald, the attorney for the respondents

averred that, and I quote from his affidavit, *“After telephonic discussions with Applicant’s attorney of record, we agreed to the terms of paragraphs 2.1 – 2.3 of the notice of motion and that the application would be removed from the roll by consent and with no cost order. It was specifically agreed that the above would be a gentleman’s-agreement and that it would not be embodied in a court order. Later that same afternoon and after we had agreed to the above the applicant’s attorney of record contacted me and advised me that his client required that the terms upon which we had settled be made an order of court.”*

By reason of the applicant insisting on the additional term, that is that the agreement be made an order of court, and the respondents’ refusal to agree thereto, the agreement allegedly failed.

It is further alleged that on the following day, 30 May 2003, further discussions ensued between the attorneys in an attempt to resolve the dispute, but no agreement could be reached between the parties primarily by reason of the applicant’s unwillingness to contribute to the costs of an arbitrator and the parties’ failure to agree on an arbitrator.

- [4.2] This is a factual dispute which cannot be resolved on the papers. Pursuant to the rule in **Stellenbosch**

Farmers Winery Ltd v Stellenvale Winery 1957(4) SA 234 (C) at 235 F, I am obliged to accept the factual allegations of the respondents in regard to this issue. These allegations are not so improbable or patently absurd that it can be dismissed without the hearing of oral evidence (**Plascon Evans Paints v Van Riebeeck Paints 1984(3) SA 623 (A) at 635 C**).

- [4.3] I accordingly find, for purposes of this application that no agreement as alleged by the applicant had been concluded between the parties.
- 5] I now turn to the relief claimed by the applicant in the notice of motion on the allegations contained in the supporting affidavit as amplified in the supplementary affidavit.
- 6] Mr Daffue, who represents the applicant, conceded that the relief claimed in paragraph 2.1 of the notice of motion necessarily follows upon the relief claimed in paragraph 2.2 thereof. It is accordingly not necessary to consider the contents of paragraph 2.1 of the notice of motion.
- 7] For the relief prayed for in paragraph 2.2 of the notice of motion the applicant relies on a three-pronged argument.
- 8] Firstly, the applicant contends that the second respondent had no competency to delegate his appeal authority in terms of the Code to the first

respondent.

[8.1] Mr Daffue's first submission in support of this contention is that the Code makes no provision for such delegation of powers, and, by reason of the maxim *delegatus delegare non potest*, the purported delegation of his functions as the appeal authority to the first respondent is *ultra vires* and of no force and effect.

There may have been substance in this argument were it not for the provisions of sec 3 B (1) and (4) of the Public Service Act of 1994 (Proclamation no 103 of 1994). These sub-sections read as follows:

“(1) Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of department shall be dealt with by, in the case of-

(a) a head of a national department or organisational component, the President; and

(b) a head of a provincial administration, department or office, the relevant Premier.

(2) ...

(3) ...

(4) The executing authority referred to in paragraph (a) or (b) of subsection (1) may delegate or assign any power or duty to appoint the head referred to in that paragraph, as well as any power or duty regarding the other career incidents of that head, in the case of-

- (a) *the President, to the Deputy President or a Minister; or*
- (b) *the Premier of a province, to a Member of the relevant Executive Council.”*

To my mind the functions of the second respondent as appeal authority referred to in paragraph 8 of the Code, falls squarely within the ambit of “*other career incidence*” as contemplated in the aforesaid sections of the Public Service Act, as far as those provisions are applicable to a Head of a Provincial Department.

The second respondent was therefore statutorily authorised and entitled to delegate his functions under the Code to the first respondent. The maxim *delegatus delegare non potest* therefore finds no application in this matter. See **Attorney General OFS v Cyril Anderson Investments 1965(4) SA 628(A) at 639 C**; and **Rudolph & Another v Commissioner for Inland Revenue 1997(4) SA 391 (SCA) at 396 B**.

- [8.2] Secondly, Mr Daffue submits that, since the second respondent recused himself from the appeal, he became *functus officio* and unable to delegate his functions to the first respondent.

The short answer to this argument is simply that the second

respondent was never ceased with the appeal, has not exercised nor attempted to exercise any functions as appeal authority under paragraph 8 of the Code, and could not and did not recuse himself from the appeal. What he did was to delegate his functions as appeal authority to the first respondent. His reasons for delegating his aforesaid powers cannot be construed as a recusal.

- 9] Secondly, the applicant contends that his complaint against the first applicant's appointment as the appeal authority is reasonable based on a reasonable apprehension of bias.

[9.1] The sum total of the applicant's allegations in support of this contention are the following:

"Although I have been advised that it is not necessary to deal with the disciplinary hearing and the various procedural and other defects in detail, I wish to indicate that I have reason to believe that the judgment will be set aside on appeal if a neutral and competent person is appointed as appeal authority. I cannot say the same in the case of 1st Respondent who is a confidant of and employee appointed by the 2nd Respondent."

- [9.2] This is a bare statement of opinion unsupported by any corroborative evidence or factual averments. The aforesaid allegations do certainly not substantiate a reasonable apprehension of bias. To my mind it does

not even disclose a reasonable suspicion of bias. See **Sager v Smith 2001(3) SA 1004 (SCA) at 1009 E** and **at 1010 F to H** where it was held, *“The test to be applied is an objective one, requiring not only that the person apprehending the bias must be a reasonable person but also that the complaint must be reasonable. See S v Roberts (loc cit). This two-fold feature of the required objective standard has been described in SARFU and SACCAWU as the double requirement of reasonableness. In SACCAWU it was said the double reasonableness requirement highlights the fact that mere apprehension on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. See paras [14] and [16]. The statement in the judgment of the Court a quo that '(t)he existence of such suspicion is a matter of subjective perception by the complainant party' is accordingly contrary to the principles laid down in the above cases, requiring that the apprehension must be that of a reasonable person.”*

- 10] The third contention advanced on behalf of the applicant is that the provisions of Resolution 1 of 2003 adopted by the Public Service Co-ordinating Bargaining Council on 28 February 2003 whereby Resolution 2 of 1999 (the Code) was amended, is applicable to the pending appeal of the applicant.

[10.1] The relevant provisions of Resolution 1 of 2003 being paragraph 3(c)(ii) thereof reads as follows:

"3. THEREFORE the parties resolve –

a) ...

b) ...

c) that for purposes of paragraph 3(b), if the employee charged with misconduct is a head of department –

i) ...

ii) the relevant Premier (in respect of a provincial head of department) or the President is involved in the initial disciplinary proceedings against the head of department, the appeal must be dealt with by a panelist of the relevant sectoral bargaining council in the public service."

[10.2] It is submitted that the second respondent *"is involved"* in the initial disciplinary proceedings and therefore the appeal must be dealt with by a panelist of the relevant sectoral bargaining council. It is alleged that the second respondent became involved in the initial disciplinary hearing by reason of the fact that he addressed the following letter to the applicant on 5 November 2002:

“You were charged with misconduct of sexual harassment and after a properly constituted disciplinary inquiry you were found guilty on four counts and not guilty on one count.

In the circumstances I had time to peruse and consider the recommendation of the chairperson, more importantly, the chairperson’s analysis of mitigation and aggravating factors in this regard.

In my consideration of the aggravating and mitigating circumstances I believe that the case in aggravation of sentence far outweighs your case in mitigation. In the light therefore, I have resolved to impose the following sanction:

That you are discharged from the Public Service in terms of clause 7.4 (vii) of the Disciplinary Code and Procedure (PSCBC Resolution 2 of 1999).

You are further reminded that you have the right to appeal this decision to the Presidency in terms of clause 8.2 of the Disciplinary Code and Procedure. This must be done within five(5) working days after receipt of this letter.”

Ms Henriques, appearing for the respondents, submitted that, by having dismissed the applicant, the second respondent merely exercised a statutory duty, since he is the only person authorised by the Public Service Act to discharge a head of department. This argument appears to be a sound one.

If the dismissal by a Premier of a head of department in terms of the Public Service Act is to be regarded as

him or her “*becoming involved*” in the initial disciplinary proceedings, he would hardly ever, if at all, be able to exercise his or her appeal authority in terms of sec 3 B(1) of the Public Service Act and/or the Code as amended by paragraph 3(c)(ii) of Resolution 1 of 2003. The word “*involve*” is defined in the Concise Oxford Dictionary as “*cause to experience or participate in an activity or situation*”. This appears to me to be the meaning to be ascribed to the words “*is involved*” as used in paragraph 3(c)(ii) of Resolution 1 of 2003. A Premier would be involved in the initial disciplinary proceedings if he has, for instance, initiated the proceedings as a complainant or if he participated in the disciplinary proceedings as a witness. To my mind his exercising of a statutory function to discharge a head of department, cannot be construed as having become involved in the initial disciplinary proceedings, even, as in the instant matter, he considered the recommendations of the disciplinary tribunal prior to his discharging the head of department.

[10.3] It is further submitted by Mr Daffue that the aforesaid provisions of Resolution 1 of 2003 contains a prohibition against the delegation of his powers by the second respondent in terms thereof.

The answer to this argument is that the provisions of this Resolution is of necessity subject to the provisions of the Public Service Act referred to herein before.

[10.4] From the aforesaid, it will be noted that I have assumed that Resolution 1 of 2003 is applicable to the present matter. However, this assumption may not necessarily be correct. If, as submitted by Mr Daffue, the Resolution deals with procedural matters only, it may be said that it has retrospective operation and it's provision are applicable to the applicant's appeal, although the Resolution only came into effect on 28 February 2003, ie subsequent to the lodging of the appeal. (See **Fredericks & Others v MEC for Education & Training, EC 2002(2) SA 693(CC) at 703 B to E**). To my mind, it is doubtful whether the establishment of a new appeal authority (as was done in paragraph 3(c)(ii) of Resolution 1 of 2003) can be categorised as a procedural matter. I have nevertheless assumed in favour of the applicant that this is the position.

[11] Mr Daffue moved for an amendment of prayer 2.3 of the notice of motion to substitute the reference therein of a retired judge or senior advocate for the panelist of the relevant sectoral bargaining council in the Public Service referred to in paragraph 3(c)(ii) of

Resolution 1 of 2003.

By reason of my aforesaid finding that the second respondent was not involved in the initial disciplinary proceedings, the *ratio* for the amendment has fallen away. I am not aware of any authority in terms whereof I can prescribe to the second respondent in what manner he is to exercise his power to delegate his executing authority in terms of the Public Service Act.

Therefore the application is dismissed with costs.

HJ Lacock
JUDGE

For the appellant: Adv JP Daffue (instructed by Elliot, Maris, Wilmans & Hay)

For the respondents: Adv JI Henriques (instructed by Towell and Groenewald)