



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2950/2011

In the matter between:

ANDILE NGCONGO

Applicant

and

UNIVERSITY OF SOUTH AFRICA

First Respondent

ANTON BAKKER

Second Respondent

Heard: 17 January 2012

Order: 17 January 2012

Reasons: 23 February 2012

Summary: Urgent review of a Ruling by a Disciplinary Panel allowing First Respondent to appoint an external legal representative to act as an initiator at the applicant's disciplinary hearing. Application dismissed with costs.

JUDGMENT-REASONS FOR ORDER

AC BASSON J

Introduction

- [1] This was an urgent application in terms of which the applicant (“Mr Andile Ngcongco”) sought an order interdicting the first respondent (the University of South Africa – hereinafter referred to as “UNISA”) from proceeding with a disciplinary enquiry against him on 18 and 19 January 2012. The applicant further sought an order reviewing and setting aside the Ruling made by the Chairperson of the Disciplinary Panel dated 14 November 2011 allowing the employer to be represented by an external representative who will act as the initiator at the disciplinary hearing of the applicant. The Court dismissed the application with costs including the costs of senior counsel.

Brief exposition of the relevant facts

- [2] The facts that gave rise to this application are non-contentious. The applicant is employed as a legal advisor in the Legal Services Department in the Directorate Labour Law. He is an admitted attorney and his day to day duties include advising UNISA on labour matters and representing the University in CCMA hearings.
- [3] On 28 October 2011, the applicant was served with a charge sheet containing 52 charges. Most of these charges deal with gross negligence on the part of the applicant in the performance of his duties in respect of various legal issues involving UNISA. A disciplinary hearing was scheduled for 14 November 2011. The disciplinary hearing commenced on the aforementioned date. A panel consisting of a Chairperson, Professor Ahmed Cachalia and two assessors was appointed. The applicant was represented by a co-employee Mr Ratiba - a senior lecturer of the Department of Private law in the college of Law at UNISA. From the transcript of the disciplinary hearing it appears that UNISA was represented by Mr. A Bakker (an external attorney – the second respondent) and Ms Juliette Grosskopf (an employee of UNISA). The disciplinary hearing was arranged by the Legal Services Department, Directorate: Labour Law – the department responsible for handling and administering formal discipline. It is further the responsibility of this

department and the employees from within this department to represent UNISA at internal disciplinary hearings against employees.

[4] In terms of paragraph 7.2.1(i)(b) of the Disciplinary Code,¹ an employee has the right to be represented by a fellow employee or a recognised labour union representative. As already pointed out, the applicant was represented by Mr Ratiba and UNISA by Mr Anton Bakker.

[5] At the commencement of the hearing, the panel was requested to rule on two issues. Firstly the question whether UNISA was entitled to appoint an external legal representative as well as the question of a postponement. The objection to Mr. Bakker representing UNISA arose from paragraphs 7.2.1(ii) and 2.4 of the Disciplinary Code which read follows:

'[7.2.1(ii)] *ER&HR will represent the University in the matter;*² alternatively, ER&HR Pol³ must nominate a suitable qualified employee of the University for this purpose. All persons representing the University must have appropriate training and experience in conducting disciplinary proceedings.'

'[2.4] In any disciplinary proceedings instituted against an employee in terms of this Code, such employee is entitled to representation by a recognised labour union representative or any permanent co-employee of his or her choice. *External legal representation is not permitted.*'⁴

[6] Mr Ratiba argued that Mr Bakker should not be allowed to represent UNISA because the Disciplinary Code does not permit external representation.

[7] The Panel concluded firstly that it has a discretion to consider the issue of legal representation and secondly, on consideration of the complexity of the matter, the legal issues to be raised, the prejudice to the parties and fairness, that UNISA should be permitted to use external legal representation. The Panel further decided that the applicant would have the same right. The disciplinary hearing was thereafter postponed to 7, 9 and 12 December 2011 to enable the applicant to secure legal representation should he wish to do so.

¹ Approved by UNISA's Council on 23/03/2010.

² Court's emphasis.

³ An acronym for the Directorate: Employee Relations and HR Policy.

⁴ Court's emphasis.

- [8] On 7 December 2011, the applicant was represented by Mr. Bheki Phakhati. The applicant, however, sought a postponement of the hearing because the attorney he had instructed to represent him became unavailable. The hearing was then postponed to 18 and 19 January 2012. The present application was launched on 23 December 2011.

Ad urgency

- [9] It was argued on behalf of UNISA that the matter is not urgent and that the urgency was self-created. I am in agreement that this application is not urgent. The Ruling of the Panel that the applicant is now seeking to review on an urgent basis was already made on 14 November 2011. This application was, however, only launched five weeks later. I have perused the papers and can find no explanation why it was not possible to have launched the application soon after the Ruling was made. More importantly, after the Ruling, the applicant participated in the hearing on 7 December 2011 and in fact indicated to the hearing that he had instructed an attorney to represent him but that the attorney was unavailable.
- [10] I am of the view that the applicant, by participating in the proceedings in the manner that he did, accepted to abide by the Ruling. Moreover, at the continuation of the hearing, the applicant did not indicate that he intended to bring this application. The applicant should therefore not be entitled to pursue this application and more so, on an urgent basis.
- [11] I am also not persuaded that the applicant will suffer any real prejudice if the relief sought is not granted. Firstly, the applicant was also granted the opportunity to obtain the services of an attorney. As already indicated, he did at first obtain legal representation only to thereafter argue that he is prejudiced by the Ruling as he 'may not have the financial muscle to have 'Rolls-Royce' legal representation'. He further argued that there will not be 'equality of arms'. I am not persuaded that this is indeed the case: Firstly, the applicant himself is an attorney. If he decides not to appoint a legal representative he is able to represent himself. The applicant has practical experience in light of the fact that he is an admitted attorney. He is therefore

equally competent to represent himself than any attorney representing UNISA. Secondly, as already pointed out, the applicant has been granted the opportunity to engage an attorney of his choice. UNISA can hardly be held accountable for his decision in this regard.

- [11] Moreover, even if the applicant decides not to appoint a legal representative, the applicant is no worse off than the thousands of individual applicants who regularly appear in this Court without legal representation. In almost all of these cases these individuals have no legal qualification and often these applicants have no proper formal schooling. Yet they often leave the doors of this Court with a court order in their favour.

Merits of the application

- [12] Despite the fact that I am of the view that the matter is not urgent, I have nonetheless decided to deal with the merits in order to bring finality to the dispute.

- [13] It is accepted that the Labour Court has jurisdiction to interdict unfair conduct, including unfair conduct relating to disciplinary action or hearings. The Court will, however, not lightly interfere with an incomplete disciplinary hearing except in exceptional cases. See in this regard *Booyesen v Minister of Safety and Security and Others*⁵ where the Court held as follows:

‘To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.’⁶ The list is not exhaustive.’

⁵ (2011) 31 ILJ 112 (LAC) at para 54.

⁶ *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 133 (A).

See also *Mortimer v Municipality of Stellenbosch and Another*⁷ where the Court held as follows:

‘Where a person in truly extraordinary circumstances – a matter to which I revert in considering the third issue – approaches the labour Court on the basis that a disciplinary enquiry was for instance, about to commence or was conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in law the enquiry, I have little doubt that the Labour Court would in law exercise these powers to stop it.’

Does the panel have a discretion?

- [14] In deciding whether to interfere with the Ruling, the first question to be answered is whether the Disciplinary Code in fact grants UNISA a discretion to employ the services of an outside legal representative to represent it at the disciplinary hearing as an initiator. In order to answer this question, regard must be had to the provisions of the Code. In paragraph 1.1 of the Code, it is stated that it is the ‘purpose of this Code [is] to provide certainty and clarity with regard to the content and consequences of misconduct and about the efficient and fair application of discipline’. Further in paragraph 2.3 it is stated that ‘discipline must be as fair and efficient as possible’ and further it is stated that ‘a fair procedure must be followed in the application of discipline’. It is clear from these paragraphs that the Code has been adopted to ensure that a disciplinary process instituted against an employee adheres to principles of fairness.
- [15] At issue here is paragraph 2.4⁸ of the Code where it is stated that external legal representation is not permitted.⁹ It was with reference mainly to this paragraph, that the applicant submitted that UNISA is not allowed to use an external initiator in the matter.
- [16] It is accepted that a disciplinary code is a guideline and that employers should generally only be allowed to depart from a code in exceptional or appropriate

⁷ Unreported matter of the WCC (case no 18243/2008).

⁸ Quoted in paragraph [5] above.

⁹ Court’s emphasis.

circumstances. See in this regard: *Solidarity/MWU on behalf of Van Staden v Highveld Steel and Vanadium and Another*¹⁰

‘It must be borne in mind that a disciplinary code is merely a guideline, whose application depends on the circumstances of the case.’

See also *SA Tourism Board v CCMA and Others*¹¹ where a similar view was followed:

‘The established principle that, ultimately, a disciplinary code is not intended to be peremptory in its terms but rather to provide a guideline for fair and equitable procedure.’

See also in general the decision in *The MEC: Department of Finance, Economic Affairs and Tourism: Northern Province v Schoon Godwilly Mahumani*¹² where the Supreme Court of Appeal had to consider an appeal against a finding that the respondent was entitled to legal representation at a disciplinary hearing. At issue in this case was clause 8 of the Disciplinary Code and Procedures for the Public Service which stated that neither the employer nor the employee may be represented by a legal practitioner unless the employee is a legal practitioner. Patel AJA held as follows:

‘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 (2005) 26 ILJ 2045 (LC) at para 14.

¹¹ [2004] 3 BLLR 272 (LC).

¹² [2005] 2 All SA 479 (SCA) at para 9-13.

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 Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA) at paras 12 and 13).

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 Administrative Justice Act¹³ in respect of administrative action in general corresponds with the common law in respect of disciplinary proceedings.

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.

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.'

¹³ 3 of 2000.

- [17] Apart from the fact that I am persuaded that there are exceptional circumstances and appropriate circumstances present warranting a departure from the Disciplinary Code, the applicant's representative (Mr. Rathiba) at the hearing also accepted during argument that the panel has a discretion to deviate from the Code and that the Panel may do so in exceptional circumstances.¹⁴ At the time therefore, it was not in dispute that the Panel had a discretion to decide whether external representation should be allowed.
- [18] Although the principle that a disciplinary code constitutes merely a guideline and that a deviation from a disciplinary code may be warranted in certain exceptional and appropriate circumstances is supported by case law, I am in agreement with Mr. Redding that it is unlikely that this Court will hold that legal representation can never be permitted under any circumstances even where the Code states that 'external legal representation is not permitted'.
- [19] Having accepted that the Panel had a discretion to allow external legal representation, it must now be considered whether the Ruling of the Panel was reasonable.

Is the Ruling reasonable?

- [20] Should the Court interfere with the Disciplinary Hearing on an urgent basis and set aside the decision of the Panel to allow the employer to engage external legal representation? In reviewing the Ruling, the Court must consider whether the Ruling was unreasonable. In considering the reasonableness of the Ruling, the Court must consider whether the Panel failed to consider an important and relevant factor or whether the Panel considered an irrelevant factor which it should have ignored and whether the Panel failed to apply its mind in accordance with relevant laws or principles.
- [21] The chairperson's ruling is to be found on page 87 – 95 of the transcript of the Disciplinary Enquiry. After concluding that the Panel does indeed have a discretion to consider the application for legal representation, it considered the merits of the application. In arriving at the decision, the Panel considered

¹⁴ At paragraph 6.2 of the Founding Affidavit.

whether the matter is in itself complex; whether there are 'peculiar legal questions which laypeople many not necessarily be able to understand nor the people themselves be able to deal with'; whether there is prejudice to the other party and lastly the question of fairness. The Panel also took into account that the charge sheet consists of 52 charges. Some of the charges involve the issue of prescription in that it is alleged that the applicant had failed to perform his duties in that he had failed to ensure that certain claims of UNISA against certain individuals do not prescribe. The Panel concluded that these issues, which are of a legal nature, need to be properly ventilated and that legal representation should therefore be allowed. In respect of prejudice, the Panel concluded that the applicant will not be prejudiced because he is also afforded the right to engage the services of a legal representative.

- [22] In order to evaluate the reasonableness of the Ruling it is necessary to briefly consider the circumstances that led to the application for external representation. The appointment of Mr. Bakker as the initiator was as a result of a motivation that was submitted to UNISA's Management Committee for the appointment of an external initiator. Mrs. Grosskopf and Mr Singh (the deponent who is the Assistant Principal of UNISA) drafted a memorandum for consideration by the University's Management Committee on 6 September 2011 to appoint an initiator. According to UNISA's papers, an internal initiator could not be appointed from the ranks of UNISA for the following reasons: Firstly, it would have been inappropriate in the present case to have used one of the employees of the Legal Services Department because the applicant's superiors within the Department (Mrs. Grosskop and Mr van Wyk) would be required to testify. Ms. Ringane would also not be a suitable person given her close working relationship with the applicant. Secondly, consideration was given to the potential impact on the working relationship between the applicant and his colleagues within the Directorate: Labour Law if one of them was to act as initiator against the applicant and if he should ultimately not be dismissed. Thirdly, the hearing would involve issues relating to the practical application of court processes and rules as well as the manner in which an

attorney's office operates as this is the manner in which the Legal Services Office is run on a daily basis.

- [23] I am persuaded that the Ruling is reasonable in the present circumstances and that no exceptional circumstances exist which warrant the interference of this Court. I am furthermore also not persuaded that the Ruling which allows UNISA to be represented by an external legal representative will lead to a grave injustice. I am particularly not persuaded that the applicant will suffer prejudice. I am also not persuaded by the argument that in order to ensure 'equality of arms' he will have to incur costly legal representation. The applicant has the choice to appoint an external legal representative and even should he decide not to do so, he as an in-house professional lawyer will not be prejudice. The applicant does not state in his papers that he is not able to deal with the issues because they are complex. In fact, he himself states that the case does not present any legal complexity.
- [24] During argument, however, it became apparent that the real issue is the fact that the appointment of an attorney will have financial implications for the applicant. In fact, counsel on behalf of the applicant conceded that the matter would not have been before this Court if UNISA had offered to pay for the applicant's legal representation. This concession came, to say the least, as a surprise. The applicant complains about the financial implications of the Ruling yet there is nothing on the papers to suggest that the applicant has approached UNISA with a request for financial assistance. I have already pointed out that even if the applicant should decide not to appoint a legal representative it does not mean that he will not be able to defend himself. He is, after all an admitted attorney. In any event, even if it was so that there is no 'parity of arms' that in itself does not point to an injustice. See in this regard *Volschenk and Another v Morero NO and Others*.¹⁵

'The main authorities on the question of legal representation in internal enquiries do not dictate that there must be a parity between the ability and expertise of representatives, but only that the procedure should be fair.'

¹⁵ [2010] JOL 26457 (LC) at para 12.

[25] In the event, it is concluded that the Ruling of the Panel is reasonable. The application is therefore dismissed. I can find no reason why costs (including the costs of senior counsel) should not follow the result. In this regard it was taken into account that the decision of this Court in respect of this matter is of crucial importance to UNISA and that it necessitated representation by senior counsel.

AC BASSON J

Judge of the Labour Court

APPEARANCES:

FOR APPLICANT: Mr Sizwe Snail of Snail Attorneys

FOR RESPONDENT: Advocate A Redding SC

Instructed by Bakker Attorneys

LABOUR COURT