

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE ADMINISTRATOR OF THE ORANGE FREE STATE

First Appellant

THE DIRECTOR OF HOSPITAL SERVICES,  
ORANGE FREE STATE

Second Appellant

THE PROVINCIAL SECRETARY OF THE ORANGE  
FREE STATE PROVINCIAL ADMINISTRATION

Third Appellant

THE MEDICAL SUPERINTENDENT PELONOMI  
HOSPITAL

Fourth Appellant

and

PULENG ELLEN MOKOPANELE

First Respondent

MMANOKENG MARY MOEENG

Second Respondent

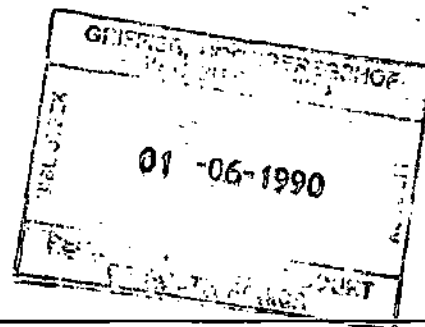
OZIE LITJAMELA

Third Respondent

CORAM: HOEXTER, VAN HEERDEN, STEYN, JJA et  
NICHOLAS, FRIEDMAN, AJJA

HEARD: 4 May 1990

DELIVERED: 1 June 1990



J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

Towards the end of August and at the beginning of September 1987 and at the Pelonomi Hospital in Bloemfontein. ("the hospital") a large number of workers employed by the Orange Free State Provincial Administration ("the administration") went on strike for two or three days. On 17 September 1987 the administration summarily dismissed some of the workers who had taken part in the strike. These included the two respondents in this appeal. The four appellants are respectively (1) the Administrator of the OFS; (2) The Director of Hospital Services for the OFS; (3) The Provincial Secretary; and (4) the Medical Superintendent of the hospital.

Also employed at the hospital in August 1987 was Mr O Litjemela ("L"). L was summarily dismissed by the administration on 31 August 1987. At the time of their

dismissal the respondents and L were all members of the Public Service. They were "employees" as defined by sec 1 of the Public Service Act, 111 of 1984. Before dismissing them the administration did not give either of the respondents or L a hearing. During April 1988 the respondents and L ("the applicants") took legal steps against the appellants. On notice of motion they applied in the Court below ("the application") *inter alia* for an order (see para 2 of the relief claimed in the notice of motion) declaring "the applicants' purported dismissals" by the Provincial Secretary, acting on behalf of the Administrator, "to be wrongful and unlawful", and setting the said dismissals aside. The application was founded on an allegation that the administration had failed to apply the maxim "*audi alteram partem*" ("the audi principle"). The appellants resisted the application. On behalf of all four appellants there was filed a single

opposing affidavit. It was deposed to by Mr G J Rossouw who is a senior official in the Public Service. Mr Rossouw is an Assistant Director, Labour Utilisation, in which capacity he is employed by the administration.

The application came before VAN COLLER, J. Having heard argument thereon the learned Judge granted the applicants the relief sought by them in para 2 of their notice of motion; and the appellants were ordered to pay, jointly and severally, the costs of the application. For a full exposition of the facts of the case and a discussion of the reasons which prompted the Court a quo to issue the orders aforesaid reference should be made to the judgment of VAN COLLER, J which has been reported sub nom **Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere** 1989(1) SA 434 (0). With the leave of the learned Judge the appellants appeal to this Court. The appellants do not, however, pursue the appeal in respect of L who was

cited as the third respondent. In his founding affidavit L denied that he had participated in the strike. The truth of this denial was not challenged by the appellants. In his answering affidavit Mr Rossouw informed the Court that it had been decided to pay L his salary from 1 September 1987 to 31 December 1987, on which date he attained retirement age. The appeal is therefore limited to a consideration of the merits of the case made out on behalf of the two respondents.

Expressing agreement with the reasoning of GOLDSTONE, J in *Mokoena and Others v Administrator of Transvaal and Others* 1988 (4) SA 912 (W), VAN COLLER, J concluded (at 443C) that the administration should have accorded the respondents a hearing prior to dismissing them; and that its failure to do so rendered their dismissal invalid. Immediately before recording this conclusion in his judgment the learned Judge made the

following further observations on the merits and equities of the case (at 443A-C):-

"n Verdere oorweging wat vermelding verdien is die feit dat aan die applikante gesê is dat indien hulle nie die volgende dag, d w s 27 Augustus, hul werksaamhede hervat nie hulle ontslaan sou word. Nieteenstaande die feit dat hulle aan die opdrag gehoor gegee het, is hulle nogtans ontslaan. Afgesien van die feit dat die Administrasie deur dié optrede moontlik die eleksie uitgeoefen het om die applikante nie te ontslaan nie en die ontslag van die applikante op grond hiervan ook moontlik onregmatig was, verhoog dit die mate van onbillikheid waarmee teen die applikante opgetree is."

In argument before us Mr Cilliers, who led for the respondents, supported the conclusion of the Court below that the dismissal of the respondents was invalid. He advanced two separate grounds, to which he alluded respectively as the "narrow" and the "broad" argument. For the sake of convenience I shall use the same words. The broad argument on behalf of the respondents was to the effect that the circumstances of the

case were clearly such as to attract the principles of natural justice; and that the Court below had correctly decided that the administration's failure to apply the audi principle rendered the dismissals invalid. The narrow argument pressed upon us by Mr Cilliers was based on the premise that the administration had in any case elected not to dismiss the respondents, which possibility was adumbrated in that portion of the judgment of VAN COLLER, J (at 443A-C) earlier quoted. For purposes of his narrow argument counsel for the respondents accepted the validity of the general legal proposition that an employee's participation in an illegal strike represents an unlawful repudiation of his contractual obligation to work or at any rate a fundamental breach of that obligation which entitles his employer, if the latter so chooses, summarily to dismiss the errant employee. However, Mr Cilliers went on to argue that in so far as a vested right summarily to

dismiss the respondents had accrued to the administration, the latter had through its representative, Mr Rossouw, divested itself of that right when it conditionally exercised its power of election not to dismiss, and the respondents accepted the election by complying with the condition. The administration was thereafter precluded from relying, as a ground for summary dismissal, upon any illegal work-stoppage on 25 and 26 August 1987. This particular submission had not been advanced in the respondents' heads of argument, which were prepared by other counsel. Before the start of argument in this Court, however, Mr Cilliers informed Mr Olivier, who appeared for the appellants, that he proposed to rely on the narrow argument.

In the course of a thorough argument on behalf of the appellants Mr Olivier dealt with the respondents' broad argument by contending that the administration's decision

to dismiss the respondents did not fall within the compass of administrative law and that there was simply no room for an application of the rules of natural justice in general or the audi principle in particular. The contractual relationship between the respondents and the administration, he argued, was purely that of master and servant; and inasmuch as the respondents' participation in the strike amounted to unlawful repudiation of their contracts of service, their summary dismissal had been not only legitimate but fair and equitable to boot. In regard to Mr Cillier's narrow argument Mr Olivier made a twofold submission. In the first place he contended that the affidavits filed in the application contained insufficient evidence to support a conclusion that Mr Rossouw had been authorised by the administration to inform striking workers that if they failed to return to work on 27 August 1987 they would be dismissed.

Alternatively, and even assuming that Mr Rossouw had been clothed with such authority, it was said that Mr Rossouw's aforesaid intimation was not reasonably susceptible of the interpretation that if the striking workers did return to work by the stipulated date, the administration would not thereafter summarily dismiss them on the strength of the work-stoppage on 25 and 26 August 1987. The validity of these submissions must now be considered.

The respondents are both women who were employed at the hospital as cleaners. In this capacity the first respondent had been employed since 1973 and the second respondent since 1966. The first respondent is a widow who started work at the hospital at an annual wage of R366. Since 1978 she has made monthly contributions to a compulsory pension fund. At the date of the dismissal her net monthly wage was R341,35. The personal circumstances of the second respondent are different, but

in regard to the course of the strike and what was communicated to the strikers by Mr Rossouw the founding affidavit of the second respondent is substantially the same as the first respondent's affidavit. In comparing the salient features of the respondents' version with what is said in Mr Rossouw's affidavit I shall, for the sake of brevity, confine myself to the first respondent's founding affidavit.

In order to gain a proper perspective it is convenient to refer to some of the statements contained in Mr Rossouw's lengthy opposing affidavit. He expressly avers that he is duly authorised to make the opposing affidavit and to oppose the application on behalf of the appellants. In para 1 of his affidavit Mr Rossouw gives the following description of his post and the scope of his official duties:-

"Ek is uit die aard van my pos belas met personeelaangeleenthede wat insluit die

onderhandelings met werknemers in diens van die Provinsiale Administrasie van die Oranje-Vrystaat, onder andere ook werknemers te Pelonomi Hospitaal, Bloemfontein."

Later in his affidavit Mr Rossouw describes the various services provided by medical and non-medical staff (such as cleaners) at the hospital; and he points out that the dislocation of any of these services as a result of a work-stoppage may entail very serious consequences.

On 25 August 1987 Mr Rossouw was informed that some of the workers at the hospital were on strike. Thereupon he decided -

".....om as waarnemer die situasie in oënskou te neem en my hulp waar nodig aan te bied."

Accordingly he proceeded to the hospital where in the reception area of the oncology department he encountered an unruly mob of strikers who demanded that the Medical Superintendent should present himself. Mr Rossouw advised the Medical Superintendent not to expose himself to the

refractory strikers. After discussions with the Medical Superintendent and the secretary of the hospital -

".....en telefoniese konsultasie met lede van die Departement Hospitaaldienste van die Provinsiale Administrasie van die Oranje-Vrystaat, het ek opdrag gekry om met die groep samesprekings te voer."

Mr Rossouw then went back to the strikers and when the latter had calmed down somewhat, Mr Rossouw asked them to appoint their own representatives to speak with him. Thirteen strikers came forward and for some hours Mr Rossouw was elsewhere closeted with them, during which negotiations -

".....verskeie klagtes en probleme bespreek is, welke klagtes en probleme na my mening opgelos is, insluitend die nie-erkenning van n vakbond."

On 26 August 1987 Mr Rossouw was advised that a group of workers had again foregathered in the reception area of the oncology department. Mr Rossouw proceeded to the hospital and entered the said area at 10h30. As on the previous

day he encountered an unruly and noisy throng. Again he asked for representatives to be appointed. His request was met; and he held consultations with such representatives until 13h15. Mr Rossouw returned to the reception area at 16h00. He told the striking workers there present that if they refused to return to work forthwith disciplinary action would be taken against them, and -

"Ek het hulle ook meegedeel dat indien hulle nie die volgende dag hulle werk sou hervat nie, hulle ontslaan sou word."

The first respondent's version of this last intimation by Mr Rossouw to the strikers at 16h00 on 26 August 1987 is the following:-

"Mr Rossouw stated that unless we returned to work the following day, we would face dismissal. In the light of this ultimatum I and a large number of fellow employees elected to return to work the following day. This I did and I continued to work in accordance with my duties until 17 September when the Administration purportedly dismissed me."

I should add that in his affidavit Mr Rossouw admits that according to hospital records examined by him the first respondent in fact worked from 27 August to 17 September 1987.

Finally mention should be made of an averment in the first respondent's affidavit that the officials of the Administration to whom she had referred -

".....were at all relevant times hereto acting on behalf of the Administration and in the course of their employment as such and within the scope of their duties."

This was not denied by Mr Rossouw in his opposing affidavit. That Mr Rossouw failed to challenge the first respondent's assertions in regard to his own position in negotiating during the strike is hardly surprising. What Mr Rossouw himself says in the opposing affidavit points clearly and cogently to the conclusion that he, with the knowledge and approval of the administration, mediated at

the hospital between the strikers and the administration with the object of trying to negotiate the end of a strike whose continuation might have paralysed the essential services which the hospital was required to provide for the community it served. It is clear on the papers that in so mediating and negotiating Mr Rossouw was authorised and empowered to issue to the strikers the ultimatum which he did. Indeed, his statement that -

".....alle inligting aangaande die staking deurgestuur was tot op die hoogste vlak, dit wil sê die Uitvoerende Komitee van die Oranje-Vrystaat en dat alle verwikkelinge op die hoogste vlak rapporteer is.....,"

lends support to first respondent's statement as to Mr Rossouw's authority. In my judgment the first limb of the appellants' argument is unsound.

The second limb of the argument appears to me to be equally untenable. What Mr Rossouw said to the respondents on 26 August was: "If you do not go back to

work tomorrow you will be dismissed." What Mr Rossouw's ultimatum naturally and necessarily implied was that if the striking workers returned to work on 27 August the administration would refrain from dismissal despite the violation of its contractual rights of which the strikers had been guilty on 25 and 26 August. The ultimatum was, I think, a clear intimation to the strikers that if they returned to work on 27 August the administration would waive its right of dismissal. Waiver is a form of contract. See *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 WLD 224 per GREENBERG, J at 226. Before a party can be held to have surrendered his right, he must know his right. Here there can be no doubt that Mr Rossouw fully appreciated the administration's right to dismiss striking workers.

The legal doctrine here involved may perhaps best be described as that of election. But in a situation

such as this the exact nomenclature is less important than a recognition of the fundamental principle that a contracting party who has once approbated cannot thereafter reprobate. The position is elucidated by DE VILLIERS, JP in the judgment of this Court in *Hlatshwayo v Mare and Deas* 1912 AD 242. The point in issue in that case was whether a litigant had by his conduct acquiesced in a judgment and had thereby lost the right to appeal against it. At 258-259 the learned Judge of Appeal said:

"Brissonius, de Verborum Significatione, sub voce acquiescere defines 'acquiescere' as 'consentire, suffragari, concedere,' which seems to show that to constitute acquiescence there must be consent. This is also what Merlin (Rep I., p. 132) calls it. He speaks of consentement. In Roman-Dutch law the point was raised by means of the *exceptie van homologatie*; *homologein* is to agree or to promise. If we look at the root of the word *acquiescere* it means to quiesce or rest in (*berusten*) in the judgment. None of the writers have analysed what this exactly means, but from the above it would seem that to constitute acquiescence there must be consent either in act or word. A person has the right to re-open the case or to appeal; he voluntarily chooses to do

an act which is clearly inconsistent with this right, and he is therefore presumed to have consented to the judgment. Whether then we base the doctrine of acquiescence on the consent which is implied or the choice which is exercised, or call it waiver makes no difference. At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate."

The principle of election finds ready application in the contractual relationship of master and servant. See **Chamber of Mines of South Africa v National Union of Mineworkers and Another** 1987(1) SA 668 (A) where the following was said at 690 D-G:-

"One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the

master then finds himself is thus described by BRISTOWE, J in *Angehrn and Piel v Federal Storage Co* 1908 TS 761 at 786:

'It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant ..... He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. Quod semel placuit in electionibus amplius displicere non potest (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place.'

The above statement of the principle may require amplification in the following respect indicated by Spencer Bower *Estoppel by Representation* (1923) para 244 at 114-5:

'It is not .... quite correct to say nakedly that a right of election, when once exercised, is exhausted and

irrevocable, or in Coke's phraseology: *quod semel in electionibus placuit amplius displicere non potest*, as if mere mutability were for its own sake alone banned and penalized by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none."

I return to the facts of the present case. In the light of what had happened at the hospital on 26 and 27 August 1987 the administration was not legally entitled to change its mind as it sought to do when it purported to dismiss the respondents on 17 September 1987. Moreover such change of mind involved a rank injustice to the respondents; and, as they were entitled to do, they raised objection to it. Simple justice between employer and employee demands that their objection should be sustained.

In my view there is no answer to the narrow

argument put forward by Mr Cilliers, and it must be upheld. This conclusion renders it unnecessary for me to consider the merits of the broad argument based upon the audi principle.

In the Court below the appellants resisted the application on the further ground (see 443 D-G of the reported judgment) that there had not been due compliance with the provisions of sec 34 of Act 111 of 1984. On this point VAN COLLER, J held (443G - 444 ) against the appellants. In argument before us Mr Olivier, while not abandoning the point, preferred (wisely, I think) not to argue it. Sec 34 is limited to legal proceedings in respect of acts or omissions "in terms of this Act." Since the appeal goes against the appellants on the narrow argument it is necessary to say no more than that the cause of action upon which that argument is founded derives from the common law. As that cause of action is unrelated to

any act in terms of Act 111 of 1984, or any omission to do anything which in terms of the Act should have been done, sec 34 has here no application.

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

G G HOEXTER, JA

VAN HEERDEN, JA     )  
STEYN, JA            )  
NICHOLAS, AJA        ) Concur  
FRIEDMAN, AJA        )