

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D1210/2000**

DATE 2000/11/13

In the matter between:

ASHLEY-DEAN GARY GEYSER

Applicant

and

THE MEC FOR TRANSPORT KWAZULU-NATAL

Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY
ON 14 NOVEMBER 2000**

ON BEHALF OF APPLICANT
Llewellyn Cain Attorneys
of Pietermaritzburg

MR R J SEGGIE instructed by

ON BEHALF OF RESPONDENT
State Attorney, Durban.

MR V SONI instructed by

J U D G M E N T**PILLAY J**

1] On 14 September 2000 the Court granted unopposed an interim interdict with a rule *nisi* requiring the respondent to show cause why its decision to transfer the applicant should not be reviewed and set aside. The matter was opposed on the return date.

2] The Court raised *mero motu in limine* the point as to whether compliance with the provisions of section 39 of the Public Service Act No 103 of 1994 (the "Public Service Act") was a jurisdictional prerequisite. Both counsel submitted further heads of argument on the point.

3] Section 39(1),(2) and (3) provide:

"1. No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act in terms of this Act, or any alleged omission to do anything which in terms of this Act should have been done, unless the legal proceedings are instituted before the expiry of a period of twelve calendar months after the date upon which the claimant had knowledge, or after the date upon which the claimant might reasonably have been expected to have knowledge of the alleged act or omission, whichever is the earlier date.

2. No such legal proceedings shall be commenced before the expiry of at least one calendar month after a written notification, in which particulars as to the alleged act or omission are given, of intention to bring those proceedings, has been given to the defendant.

3. Subsections 1 and 2 shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions of those sections where the interests of justice so require."

4] The first question to be decided is whether these proceedings are:

"legal proceedings . . . in respect of any alleged act in terms of this Act or any alleged omission to do anything which in terms of this Act should have been done."

5] In *Traub & Others v The Administrator Transvaal & Others* 1989(1) SA 397 GOLDSTONE J, who was upheld on appeal, found that the common law applied to the appointment of employees in that case. Consequently the notice required in terms of section 34(2) of the old Public Service Act of 1984 did not apply.

6] In this case the applicant has framed his complaint squarely within the parameters of the respondent's alleged failure to comply with the provisions of the Public Service Act, its code and regulations, pertaining to the transfer of employees. Counsel for the applicant contended that the cause of action was an infringement of the right to a hearing which was founded in common law. I disagree. The cause of action is the transfer of the applicant which is being challenged because of the alleged non-compliance with the *audi alteram partem* principle. The *audi* principle was also a theme in the *Traub* case. However, it was a non-appointment that was challenged in that case. The applicant is not precluded on this ground from complying with the provisions of section 39 of the Public Service Act.

7] Counsel for the applicant contended that section 35 of the General Law Amendment Act, No 62 of 1955, ("the 1955 Act") which provides as follows, applied:

"Notwithstanding anything to the contrary contained in any law, no Court shall issue any rule nisi operating as an interim interdict against the Government of the Union including the South African Railways and Harbours Administration or the Administration of any Province, or any Minister, Premier or other officer of the said Government or Administration in his capacity as

such, unless notice of the intention to apply for such a rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the said Government, Administration, Minister, Premier or officer at least seventy-two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application."

3] In *Shah & Another v The Minister of Education, Culture and Others* 1989(4) SA 560 BRISTOWE J was relieved of the obligation of deciding firstly, whether the jurisdiction conferred by section 35 of the 1955 Act was confined to the issue of a rule *nisi* having the effect of an interim interdict; secondly, whether such a rule may be confirmed and the interdict be made final without commencing fresh proceedings after giving the notice required by section 34 of Act 111 of 1984 Act, and thirdly, whether the best that could be done would be to issue a rule coupled with an interim interdict which, on confirmation, would remain an interim interdict pending the institution of proceedings in which final relief is sought. The parties to those proceedings had agreed that the Court could determine the matter finally. However, the views of the Court expressed obiter are pertinent. These can be found at page 568F-J.

"For what it is worth, however, it seems to me that once a Court can hear a matter by virtue of section 35 of the 1955 Act, it ought to be able to proceed to finality. Perhaps a useful analogy can be drawn from the well-established rule that a Court which initially has jurisdiction retains it until the suit is concluded. See Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 301.

For one must consider this. Let us assume the grant of an interim order having the

prescribed effect; that would, as I have found, clearly have been within my power. On the return date the rule, let us assume further would be confirmed on the merits. Must the applicant trip at the last hurdle because (a) the rule nisi would fall away with the grant of final relief and (b) notice in terms of section 34 had not been given? The proposition is so absurd that the Legislature could not have intended it. It must have envisaged that once the application commenced under section 35 it could proceed to finality without reference to the general provisions of sections such as section 34 of Act 111 of 1984. It could not surely have intended that the rule nisi disappears because the respondent has in fact been able to place all the relevant facts before the Court. The applicant should be put in a worse position than he would have been had the respondent required time to investigate the matter. As I have said, however, it is not necessary to decide this question."

9] The purpose of the notice in terms of section 39(2) is to inform the respondent adequately of the case against it to enable it to prepare a response. If the pleadings in the application for a rule *nisi* serve that purpose then compliance with section 39(2) is a matter of form rather than substance. Counsel for the respondent submitted that *Shah's* case did not apply because section 34 of the old Public Service Act, 1984, which applied at the time, did not allow the Court a discretion to condone non-compliance such as is now found in subsection 39(3) of the 1994 Act.

10] The absence of a discretion led the Court in the past to interpret the limitation restrictively as in *Traub's* case. The purpose of the 1955 Act was to mitigate the harshness of the limitation clauses enacted at the time. That is *Shah's* case at page 565H-I.

[1] It is arguable that the purpose of the 1955 Act fell away when the Court was granted the power in section 39(3) of the Public Service Act to grant a shorter period of notice. However, subsections 39(2) and (3) of the Public Service Act continue to co-exist with section 35 of the 1955 Act. Statutes must be construed so as to be consistent as far as possible with every other unrepealed statute enacted by the same legislature. (*Chattabai v Union Government Minister of Justice and Registrar of Asiatics* 1911(AD) 13 at 24.)

[2] Subsections 39(2) and (3) of the Public Service Act are also not in conflict with the 1955 Act. It cannot be implied, therefore, that the former repealed the latter. (*R v Durban Corporation and Another* 1946(NPD) 109; also *Shah's* case.)

[3] As far as the application for a rule *nisi* is concerned the position is therefore unaffected by subsection 39(3). For the reasons stated above the position would also not be affected if the rule *nisi* led to a final order being granted. However, subsection 39(3) compels an applicant to make out a proper case for condoning the non-compliance with the time limits. The purpose of subsection 39(3) is still achieved in an urgent application. An applicant is not relieved of its obligation to prove urgency. In coming to this conclusion it must be noted that subsections 39(2) and (3) continue to apply to all other legal proceedings in terms of the Public Service Act that do not require interim relief, i.e. where the 1955 Act has no application.

[3] Counsel for the respondent submitted that *Shah's* case was distinguishable from the present case in that the former was not in a position to comply with the notice requirements, whereas in this case the applicant knew on 19 September 2000, that is, almost more than two months before the application was launched, of the decision to transfer him.

14] The Court accepts that the applicant could and should have given the respondent better notice.

While its failure to do so can be criticised it cannot be a bar to the Court having jurisdiction as he has now made out a case for urgency.

15] In the circumstances the Court finds that compliance with section 39 of the Public Service Act is not a prerequisite to found jurisdiction in an application for interim relief and in an application to make the interim relief final.

16] The next point *in limine* raised by the respondent's counsel was that the applicant contended that the transfer was disciplinary action which fell short of dismissal in terms of Item 2(1)(c) of Part B of Schedule 7. As such, it should have been referred for conciliation and arbitration in accordance with Item 3(3) and 3(4) of Part B of Schedule 7.

17] The application and the relief claimed relates to the transfer of the applicant. Although one of the grounds on which the Applicant criticises the transfer is that it is punitive, he does not go so far as to make out a case within the ambit of the residual unfair labour practice provisions. The Court is empowered, therefore, to hear the matter as a review in terms of section 158(1)(h) which states:

"The Labour Court may review any decision taken, or any act performed by the State in its capacity as employer on such grounds as are permissible in law."

18] On the merits the applicant contended that his transfer fell to be reviewed and set aside because he was not given a hearing prior to the decision to transfer him was taken.

19] The material facts were briefly the following:

The applicant was the District Superintendent of Transport based at Kokstad. Since about 1995 there were labour problems in the department at Kokstad. Some employees challenged the applicant's sincerity, honesty and integrity. Other problems related to the conflict between the applicant and one Mr Sithole. As a result, disputes were declared in the Kwazulu-Natal Bargaining Chamber. A commission of enquiry was established under the auspices of IMSSA, the Independent Mediation Services of South Africa, in April 2000. The applicant challenged the status of the IMSSA reports compiled as a result of its intervention, and the authority of the respondent to engage IMSSA.

20] The applicant had confirmed in his letter dated 21 June 2000 that it was agreed that IMSSA could intervene. If he had intended to accord no status to the IMSSA reports he should not have agreed to the intervention. From the limited information available to the Court, it would appear that IMSSA was engaged by consent between the bargaining partners. The report therefore enjoys the status that the parties agreed to accord it. There is also nothing in law which prevents a public authority from entering into private contracts with an organisation like IMSSA in the public interest.

21] The commission of enquiry was the procedure which the parties to bargaining found acceptable as the means of addressing the labour conflict. The terms of reference of the commission were to investigate the possible causes of low productivity in Kokstad, to investigate the existence of racism and possible instigators of such racism and to make recommendations regarding the manner in which low productivity and any racism could be addressed. The

terms of reference were not to inquire into the conduct of the applicant specifically. It was certainly not a misconduct inquiry.

22] The commission convened in May 2000 and interviewed a number of employees including the applicant. The outcome of the investigation was summarised in a report in which commission made certain recommendations. It found that ninety percent of the employees who were interviewed felt that productivity was low and that people could be working harder. The reason for the low productivity was attributed to the bad relationship between the applicant and Mr Sithole, as loyalty amongst the work force was divided between the two. Racism appeared, according to the report, to be ancillary to the complaint of favouritism. The commission heard allegations that Mr Sithole favoured NEHAWU and the applicant favoured HOSPERSA. It dealt at length with the relationship between Mr Sithole and the applicant. The employees were aware that the relationship was bad. The commission found that Mr Sithole and the applicant's inability to work together affected other employees and created disharmony. The applicant disputed the correctness of the findings of the Commission.

23] The commission had also recommended, *inter alia*, that

"A mediation-style process takes place between the Department and Mr Sithole and the Department and Mr Geyser concerning the issue of transfers."

24] On the applicant's version about 12 June 2000 Khaya George, one of the IMSSA commissioners, arranged provisionally to meet with the applicant on 20 June 2000. George telephoned him again on 19 June 2000 to confirm the appointment. The applicant advanced seven reasons for not attending that meeting. Firstly, he was ill in bed with a stomach virus.

Secondly, he was given one and a half hours' notice to attend the meeting in Durban. The fax sent to him the previous day to notify him of the meeting only came to his attention that morning on 20 June 2000. Thirdly, he could not drop everything at the last minute as this was contrary to the good governance commitments and the Department's code of conduct. Fourthly, George should have telephoned him earlier to confirm the time as he had already made new commitments. Fifthly, he had not received any correspondence from his authorities to attend the meeting. Sixthly, he did not want to attend the meeting because from day one he was not allowed to have his representative. Seventhly, it would be a waste of the Department's time and money if he attended because he had been instructed to say nothing and to request the findings in writing. The reason for not attending the meeting was not that he did not know what the purpose of it was.

25] The applicant now claims that he was not aware that the meeting of 20 June 2000 was being held pursuant to the recommendation that a mediation-style process be conducted to decide on his transfer.

25] The respondent submitted that the applicant was given a hearing prior to the decision to transfer him was taken. It relies on the participation of the applicant in the IMSSA investigation and particularly on the IMSSA report dated 20 June 2000. That report reads as follows:

On 12 June 2000 Khaya George contacted Ashley Geyser to confirm that the mediation process recommended in terms of IMSSA's report take place on 14 June 2000. Geyser raised concerns about training for the Comrades Marathon and requested that the mediation take place on either 19, 20 or 21 June 2000. George said that 20 June was suitable and Geyser agreed that it would take place on 20 June 2000. Geyser indicated that he was prepared to

listen to what was said at the process but that he would not be prepared to comment without recourse to his legal representative. He said that he does not require union representation.

On 19 June 2000 George called to confirm the mediation on 20 June 2000. Geyser said that he was not prepared to attend the mediation since he was not entitled to legal representation. George said that this was a Departmental issue and undertook to speak to the Department. At no stage did Geyser say that he was not aware that the mediation was taking place.

On 19 June 2000 George contacted Herman van Straaten since he could not reach Lionel Sydenham. Van Straaten gave George Sydenham's cell phone number. George contacted Sydenham who said that he would send a fax to Geyser instructing Geyser to attend the mediation.

On 20 June 2000 George, Professor Soni and Gina Barbieri from IMSSA met with Sydenham and Malcolm Barron to conduct the mediation. Geyser did not attend. All attempts by IMSSA to contact Geyser telephonically were unsuccessful."

Sydenham and Barron were representatives of HOSPERSA of which the applicant was a member, and the Department respectively.

26] Counsel for the applicant submitted that in the absence of an affidavit from George the applicant's version as to what transpired in the telephonic discussions with George should prevail. Although the applicant recorded his discussions with George somewhat differently from the way George recorded it in the IMSSA report of 20 June, the applicant does not dispute that the meeting was arranged for his convenience.

27] The applicant now denies saying that he would not attend the meeting. However, in his letter dated 21 June 2000 he did just that.

28] Taking the applicant's reasons for not attending the meeting of 20 June cumulatively, the obvious inference is that the applicant was not willing to attend the meeting.

29] In the circumstances, although the respondent falls short of producing evidence from George that he in fact informed the applicant that the purpose of the meeting was to discuss the applicant's transfer, the quality of the applicant's evidence is not such that the Court is convinced that the applicant was not informed of the purpose of the meeting. Furthermore, it may be inferred from all the evidence that he must have known the purpose of the meeting. He must have realised the importance of it for he was not prepared to attend that meeting without legal representation, whereas in the past he had done so. As a responsible officer in the public service he ought to have taken the initiative to find out what had transpired if he was too unwell to attend.

30] Even if I am wrong in inferring that the applicant knew the purpose of the meeting, the facts before the Court appear to be in dispute and the matter should be dealt with in accordance with the decision of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*, that is, on the basis of the respondent's version .

31] There are other disputes of fact of varying degrees of materiality to this application. A material consideration is whether there were problems at Kokstad of the nature and extent that warranted the transfer of the applicant. In other words, was there substantive fairness for the decision to transfer the applicant? The applicant disputes the findings of the IMSSA commission. He specifically denies allegations of low productivity. The respondent produced

documentation in which it is recorded that poor productivity was an issue in November 1997 and January and March 1998. In reply the applicant led evidence to show that there was no lack of productivity at Kokstad. The applicant also suggests that the state of affairs at Kokstad obtained because the respondent did not act against Sithole by pursuing disciplinary action against him. This is also another dispute of fact that cannot be resolved on the papers and accordingly the *Plascon Evans* case must apply.

32] A further disputed fact is the relationship between the applicant and Sithole. His alleged willingness to reconcile his differences with Sithole is unconvincing. For instance, his stance about the disciplinary actions taken against Sithole is contradictory. I refer here to the complaint on the one hand that the respondent did not act against Sithole and on the other hand the applicant's request that his penalty of a transfer be withdrawn.

33] Having regard to the various reports about problems in the department at Kokstad, the common theme is a conflict between the applicant and Sithole. The conflict appears to be so deep-rooted that mediation has not succeeded. The transfer of the applicant was recommended as the most appropriate remedy by the IMSSA commissioners. As mediators, they were in a better position than the Court to make such a recommendation.

34] In the circumstances the application is dismissed with costs.
