

OF INTEREST

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case no. D457/03

Heard on: 29/07/03

Delivered on: 29/07/03

In the matter between:

E M KHOZA

Applicant

and

**THE PREMIER OF KWAZULU-NATAL
& ANOTHER** Respondent

JUDGMENT

[1] The applicant seeks an interim order on an urgent basis in the following terms:

"2.1 An order reviewing and setting aside the findings of the second respondent as chairman of a disciplinary hearing against the applicant which findings were delivered by him on 10 and 11 July 2003.

2.2 An order declaring the findings of the second respondent are invalid, unlawful and unconstitutional.

2.3 An order directing the respondents to forthwith cease the disciplinary hearing against the applicant pending the finalisation of this application.

2.4 That the respondents pay the costs of this application."

[2] The applicant omitted to stipulate in its Notice of Motion when and how the respondents might oppose the matter. The first respondent has opposed the matter by delivering its answering affidavit at the start of the proceedings this morning. The second respondent, the chairperson of the inquiry, has elected to abide the decision of the Court. The consequence of this omission is that the applicant is now faced with an answering affidavit which calls for a reply, without having allowed itself an opportunity to reply. Despite conceding in his address that the Court would not be able to grant the relief sought in the notice of motion without a reply being filed, Mr Sishuba, for the applicant, persisted in obtaining interim relief. Mr Nxusani for the first respondent rejected Mr Sishuba's proposal that the matter be postponed for the filing of a reply.

[3] In my view the applicant brought the application urgently. It must satisfy all the requirements therefor in its founding affidavit. If it fails to do so, the application will be dismissed.

THE BACKGROUND

[4] The applicant is the head of department in the provincial

Department of Housing, KwaZulu-Natal. On 30 January 2003 he was put on special leave as his continued presence in the workplace was not conducive to an investigation and assessment into the administration and management of the department. He was also charged criminally on a date that is not evident from his affidavit and released on bail of R500 000 and other stringent conditions.

[5] On 2 July 2003 he received via the Deputy Sheriff notice of a disciplinary inquiry to be held on 10 July 2003 in Durban. There were ten counts of misconduct alleged in the charge sheet.

[6] The applicant raised four points *in limine* at the inquiry. The second respondent dismissed all the points and postponed the matter to 12 July 2003. The applicant, represented by counsel, informed the second respondent that the inquiry should be stayed pending this application for review. The second respondent refused to do so, hence this application.

URGENCY

[7] It is submitted that the urgency arises because the second

respondent indicated that he would continue with the disciplinary inquiry in the absence of the applicant.

- [8] The applicant was aware on 11 July 2003 that the inquiry would be proceeding even if he failed to attend. He instructed counsel the next day to launch this application. The application was eventually brought on 23 July 2003. There is no explanation for the delay. The affidavit is barely 21 pages and all the information was readily available to the applicant. The respondent was subjected to the inconvenience of preparing its opposition within five days. In my view the ground for urgency does not entitle the applicant to preferential treatment on the Court rolls. Furthermore, he has not acted with sufficient expedition to warrant this Court coming to his assistance on an urgent basis.

CLEAR RIGHT

- [9] There is no doubt that the applicant is entitled to a fair hearing at a disciplinary inquiry. However, one must look to the objections and the substance of the objections that he raised at the inquiry in order to determine whether he is in fact getting a fair hearing. The objections he raised *in limine*

at the inquiry and the second respondent's responses, which form the basis of this review, are summarised thus:

THE FIRST OBJECTION

[10] The applicant challenged the validity of the charge sheet on the ground that it was signed by the Member of the Executive Council for the Department of Housing instead of the first respondent in terms of Resolution 2 of 1999. The second respondent dismissed the point raised on the basis that the first respondent had delegated that power, notwithstanding the fact that the resolution made no provision for the sub-delegation of such power. In so doing, the applicant contends the second respondent erred and committed irregularities.

THE SECOND OBJECTION

[11] The applicant submitted that there was no proper service of the notice of the disciplinary inquiry. The second respondent found that there was proper service of the notice to attend the inquiry. In so finding, the applicant alleges that the second respondent erred.

THE THIRD OBJECTION

[12] The applicant alleged that he would not have a fair hearing because the terms of his bail conditions precluded him from directly or indirectly, verbally, in writing, telephonically or in any other manner from contacting any person employed at the Department of Housing KwaZulu-Natal. The second respondent found that there was no basis in this submission. This, the applicant contended, amounted to an error and misdirection on the part of the second respondent.

THE FOURTH OBJECTION

[13] The applicant submitted that the chairperson of the inquiry had not been appointed in terms of paragraph 7.3(b) of Resolution 2 of 1999 as there was no Cabinet resolution authorising the first respondent to appoint the second respondent as the chairman of the disciplinary inquiry. The second respondent had found that he had been properly appointed. This, the applicant contended, was an error and a misdirection on his part.

[14] With regard to the first objection, section 3B(4)(b) of the Public Service Act of 1994, Proclamation 103 of 1994, permits the delegation or assignment of any power or duty to appoint the

head of a department as well as any power or a duty regarding the other career incidents of that head in the case of the Premier of the province, to a member of the relevant Executive Council. The power to delegate arises from the statute and not from Resolution 2 of 1999 which has, at best, the status of subordinate legislation. The applicant has not produced any proof that the first respondent did not validly delegate the power to sign the charge sheet. It is not likely to be a matter within his own knowledge and his bald allegation cannot found a valid objection to stay the continuation of the disciplinary inquiry.

[15] Regarding the second objection, the applicant was served via the Deputy Sheriff purportedly because he avoided personal service by other means. The primary purpose of service, namely, to notify the applicant, had been achieved and the second respondent was entitled to dismiss the objection.

[16] The third objection is contrived and disingenuous. There is no evidence that the applicant made any attempt to either have his bail conditions relaxed or to request the respondents to facilitate his access to witnesses and information to assist him

in the preparation and conduct of his defence.

[17] With regard to the fourth objection, paragraph 7.3(b) of Resolution 2 of 1999 permits the presiding officer to be

"an executing authority or another person with appropriate knowledge designated by the Cabinet or the provincial Executive Committee".

As the second respondent pointed out in Annexure MEK3, the presiding officer was, as agreed at the Public Service Coordinating Bargaining Council, appointed by the Premier in this case.

[18] Objections 1, 2 and 4 are highly technical and formal. The applicant does not demonstrate in these proceedings how the second respondent's rulings materially prejudice him on those issues. It is also remarkable that nowhere does the applicant deny the charge of misconduct against him.

[19] I am not persuaded, therefore, that he is not getting a fair hearing. The applicant in any event has the alternative remedies of conciliation and arbitration, processes which are better suited to a proper ventilation of all the issues in dispute.

[20] I was invited to award costs on an attorney and client basis against the applicant on the basis, *inter alia*, that he is an advocate and should have known better when bringing an application of this sort on an urgent basis. In my view I decline to make such an award of costs as it appears to me that the applicant, faced with a criminal prosecution and a disciplinary inquiry, already has a long and costly road to travel.

[21] In the circumstances the application is dismissed with costs.

PILLAY D, J

On Behalf of the Applicant:

Mr Sishuba

Instructed by:

Ndwandwe and

Associates

On Behalf of the Respondent:

Mr J Nxusani

Instructed by:

Deputy State

Attorney

CERTIFICATE OF VERACITY

We, the undersigned, hereby certify that **so far as it is audible to us**, the foregoing is a true and correct transcript of the proceedings recorded by means of a mechanical recorder in the matter of:

E M KHOZA vs THE PREMIER OF KWAZULU-NATAL & ANO

CASE NO : D457/03

COURT OF ORIGIN : Labour Court, Durban

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HELD AT DURBAN

BEFORE:

MS D PILLAY

E M KHOZA

VS

THE PREMIER OF KWAZULU-NATAL & ANOTHER

ON BEHALF OF THE APPLICANT:

MR SISHUBA

ON BEHALF OF THE RESPONDENT:

MR J NXUSANI

**EXTRACT:
JUDGMENT**

**SNELLER RECORDINGS:
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