NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J401/2000

In the matter between:

MOSENA, S G	**FIRST APPLICANT**
RANTETE, M J	**SECOND APPLICANT**
MATJEKANA, K S M	**THIRD APPLICANT**
and	
THE PREMIER : NORTHERN PROVINCE	**FIRST RESPONDENT**
THE DIRECTOR-GENERAL, NORTHERN PROVINCE	**SECOND RESPONDENT**
ADV J G RAUTENBACH N.O.	**THIRD RESPONDENT**
M E C FOR DEPARTMENT OF PUBLIC WORKS NORTHERN PROVINCE	**FOURTH RESPONDENT**
DEPUTY DIRECTOR GENERAL, DEPARTMENT OF PUBLIC WORKS, NORTHERN PROVINCE	**FIFTH RESPONDENT**

J U D G M E N T

WALLIS A.J.

[1] I heard and dismissed this application on the 16th February 2000. Subsequently I filed full written reasons for doing so. The unsuccessful Applicants now seek leave to appeal against my judgment.

[2] I am entitled in terms of rule 30(3A)(a) of the rules of this court to call for written

submissions in support of the application for leave to appeal and I did so. I have now received those submissions. They raise only one point of novelty and, so far as the Applicants are concerned, largely reiterate the contentions which were addressed to me at the hearing on the 16th February 2000. In the circumstances I do not regard it as necessary to hear oral argument on the application and on enquiry both parties agreed to dispense with oral argument.

[3] The application essentially concerned the question whether the provisions of clause 7.3(e) of Resolution No. 2 of 1999 of the Public Service Co-ordinating Bargaining Council had the effect of excluding any right to legal representation in disciplinary hearings involving public servants or whether there remained a residual discretion vested in the person presiding at such a disciplinary enquiry to permit legal representation if he or she thought it necessary and appropriate to do so. It was common cause that in the proceedings involving the Applicants the person presiding at the disciplinary hearing had consistently adopted the stance that there was no such discretion and the exclusion of legal representation was accordingly absolute.

[4] The first submission on behalf of the Applicants is that:

> "Since the enactment of the Constitution it is submitted that it is no longer good law that there is no general right to legal representation in administrative tribunals".

It is then said that this right is embodied in the Administrative Justice Act 2000. As pointed out on behalf of the Respondents, however, that Act is not yet in force and I fail to see on what basis it can be used to interpret the provisions of the Constitution regarding just administrative action. The provisions of section 33 of the Constitution do not expressly embody a right to legal representation in administrative tribunals even if one assumes that a disciplinary enquiry in the context of an employment relationship in the public sector is properly to be

characterised as administrative action which in my view is by no means clear. The most that can be said about the matter from a constitutional perspective is that the right to procedurally fair administrative action may in appropriate circumstances include a right to legal representation. When and in what circumstances legal representation will be appropriate is another matter entirely.

[5] It must be pointed out that the process of collective bargaining which gave rise to Resolution No. 2 of 1999 is a constitutionally protected process. The agreements concluded by means of that process are legally binding and to the extent appropriate are incorporated into the contracts of employment of employees affected thereby. (See s 23 of the LRA.) Choices made by the collective bargaining parties and incorporated in their agreements should not lightly be disturbed.

[6] The problem with the argument on behalf of the Applicants is that it invokes the Constitution entirely in the abstract and without relating it to the particular context of this case. There is simply an assertion that the old position is no longer good law without any consideration of how an application of the Constitution would impact on the particular situation of disciplinary hearings within the public service. There does not appear to be an assertion of a general right to legal representation in that context. Even if one were to come to the conclusion that clause 7.3(e) of Resolution No. 2 of 1999 in some measure infringed the right to just administrative action one would nonetheless have to consider whether such limitation was justified in terms of section 36 of the Constitution. For my part I can see compelling reasons why the deliberate choice of the collective bargaining parties to exclude legal representation at internal disciplinary enquiries is one which should be respected. That is particularly so when the choice is made in the context of the exercise of a right which is itself constitutionally protected.

[7] I have dealt with this in rather more detail than would normally be the case merely

because it is accepted in the written submissions placed before me in support of the application for leave to appeal that this was not a matter argued at the hearing. I can deal with the remaining submissions rather more briefly.

[8] The next submission is based upon the judgment in *Ibhayi City Council v Yantolo* 1991 (3) SA 665 (E). As I pointed out in my written reasons the correctness of that judgment and the processes of reasoning upon which it was based were doubted by the Appellate Division. Be that as it may the case was not concerned with a situation where the relevant provisions contained an express exclusion of the right to legal representation. A right to representation was given and the issue was whether this in an appropriate case included legal representation. Even giving that judgment and the others relied on as much weight as possible it is difficult to see how they can apply in the context of a provision which expressly excludes legal representation.

[9] Next the Applicants submit that my reliance on *Lamprecht and another v McNeillie* 1994 (3) SA 665 (AD) is misplaced. They make the point that this case is one arising in the public sector whereas that case arose in the private sector where no public law element could apply. That is so. However, I referred to the case firstly as an indication of the circumstances in which a contractual right to legal representation before a disciplinary hearing might arise and secondly because it is in that judgment that the reasoning in the case of *Ibhayi City Council v Yantolo, supra,* was criticised. The question of this being a disciplinary hearing in the public sector and the influence of administrative law provisions thereon does not arise in either of those contexts.

[10] I may say that I do not understand that a contract of employment in the public sector ceases to be a contract of employment to which ordinary contractual principles apply. My understanding of the situation is that those contractual principles may in certain circumstances be overlaid by principles of administrative

law. That is what was said in the judgment in *Administrator Transvaal and others v Zenzile and others* 1991 (1) SA 21 (AD). The old administrative law system of our common law has now, according to a recent judgment of the Constitutional Court, been subsumed into the constitutional system of administrative law embodied in section 33 of the Constitution. As I have already pointed out this case was not based upon a claim to a constitutional entitlement to legal representation. That question has only now been raised for the first time in the application for leave to appeal and then only because it is said to be "material to the matter". There is no endeavour in the papers to make out a constitutional claim and in my view there is no basis upon which it could be pursued at the appellate stage.

[11] That brings me back to what was the central issue namely whether clause 2.8 of Resolution 2 of 1999 permitted a departure from the prohibition on legal representation in clause 7.3(e). The submissions made in the application for leave to appeal are precisely the same as the submissions which were made at the hearing. I have considered them carefully but find them no more convincing now than I did then. In my view there is no reasonable prospect of another court giving these provisions the interpretation contended for on behalf of the Applicants.

[12] As regards the criticism of my findings in regard to the arbitration award and the Third Applicant's right to pursue his remedies for unfair dismissal in terms of the LRA, there is likewise nothing novel in the submissions and I am satisfied that they have no reasonable prospects of succeeding before another court.

[13] In the result I am satisfied that the Applicants have no reasonable prospects of success in an appeal against my judgment. Accordingly the application for leave to appeal is dismissed with costs.

M.J.D. WALLIS A.J.