REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J1713/03

DELIVERED ON: 2003-09-26

HEARD ON: 2003-09-26

In the matter between

THEMBA MAJOLA

Applicant

and

MEC, DEPARTMENT OF PUBLIC WORKS

NORTHERN PROVINCE AND OTHERS **Respondents**

J U D G M E N T

PILLAY D, J:

1. This review turns on the right to legal representation at a disciplinary hearing. Employers have a general duty to ensure that employees have a fair hearing prior to disciplinary action being taken against them. Whether legal representation is indispensable to ensuring a procedurally fair hearing is a

discretion conferred on the chairperson of an enquiry. The chairperson must exercise that discretion judiciously having regard to all the circumstances of the particular case. In certain circumstances the denial of legal representation could effectively be a denial of access to a court or tribunal (Sect 34 of Constitution of the Republic of South Africa Act 108 1996; Bangindawo and Others v Head of the Nyanda Regional Authority and Another 1998 (3) BCLR 314(Tk) @328H; see also S v Gouwe 1995 (8) BCLR 968 (B) @ 969G-H).

2. Whether there is a binding collective agreement on the issue of legal representation is a vital consideration. One of the pillars on which the Labour Relations Act No. 66 of 1995 (the LRA) is constructed is the primacy of collective agreements (section 1). If a collective agreement prohibits or restricts the granting of legal representation, an adjudicator may allow such representation provided just cause exists not to apply the terms of the collective agreement. In that situation, adjudicators have to balance the tension between the constitutional right of access to a court or tribunal, the primacy of collective agreements and the freedom to contract and between collective and individual rights.

3. Adjudicators must be aware that particular factors, which the parties to collective agreements consider important to the sector or industry, underpin the collective agreement. Such factors may not be immediately apparent to the adjudicators. As a result, they should be slow to disregard or deviate from applying a collective agreement.

4. It follows that the discretion exercised by a chairperson of a disciplinary enquiry in which the right to legal representation is regulated by a collective agreement would be more restricted than a situation where there is no collective agreement.

5. In this case the applicant secured on review the setting aside of a decision in which he was refused legal representation at a disciplinary enquiry on 18 April 2002. It was conceded in that case that a discretion vested in the employer to grant legal representation in appropriate circumstances; that the respondents had not exercised any discretion at all and had simply applied the collective agreement to refuse legal representation.

6. The matter was then referred back and was heard by the second respondent in this matter, one A M Carrim. The relevant terms of the collective agreement referred to in the previous case is the same as in this case and reads as follows:

> "In a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner unless the employee is a legal practitioner. For the purposes of this agreement, a legal practitioner is defined as a person who is admitted and practices as an advocate or an attorney of South Africa".

7. The first complaint against the ruling is that Carrim quoted from the decisions of *Hamata and Another v Chairperson Peninsula Technikon Internal Disciplinary Committee and Others* 2002 (23) ILJ 1531 (SEA) and *Mosina and Others v Premier Northern Province and Others*, unreported Case No. J401/2000, without properly applying his mind and those cases and to the issues before him.

8. Carrim did refer to decided cases which he acknowledged at the end of his ruling. His choice of cases indicates that he did

exercise a discretion. He therefore applied his mind to the issues and the cases he referred to were relevant.

9. The second complaint was that the first respondent employed "outside expertise" in the form of Carrim to ensure that the hearing was procedurally and substantively fair. Furthermore, the prosecutor at the disciplinary enquiry, Mr Baloyi, was formerly a prosecutor and had legal qualifications and expertise in holding criminal trials and disciplinary hearings.

10. The applicant conceded that chairperson Carrim was "neutral". That can only be to the applicant's advantage. Carrim's experience and competence in the field, which was not disputed, should have further served as assurance to the applicant that he would get a procedurally fair hearing.

11. To this complaint of relative ability of the respondents, Carrim found as follows:

> "I am of the view that even in terms of the Labour Relations Act office-bearers or officials of the trade unions or employers' organisation, have also been given right of audience in the Labour Court and the Labour Appeal Court. Union officials are well trained

> in issues of labour relations and deal with these issues on a regular basis. Therefore the argument of comparability, seriousness of charges and complexity, to me is unacceptable".

12. The applicant has not advanced any explanation as to why legal representation in the form of a practising lawyer is necessary as opposed to any other representative such as a fellow employee who might be legally trained or otherwise competent or a trade union representative.

13. Carrim elaborates on his findings on the question of seriousness and complexity as follows in his affidavit in defence of his ruling:

> "10. I consider that there were no complicated questions of law in issue in the charges against the applicant. In fact, I consider that the legal principles were simple and that the issues in dispute were likely to be factual. I also considered that the charges were clear.
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> 11. It was submitted on behalf of the applicant that the charges contain elements of public law, administrative law, criminal law and fraud, which

made the nature of the charges complex. When examining the charge sheet it appeared to me that the complaint(s) against the applicant were that he committed certain irregularities such as:

11.1 altering tender amounts;

11.2 recommending a tenderer whose tender documents had not been deposited in the tender box;

11.3 disqualifying a tenderer on the ground that its tax clearance certificate had not been submitted while the contrary applied;

11.4 recommending one tenderer when its tax clearance certificate was not submitted; and

11.5 accepting late submissions of tax clearance certificates.

12. The charges appear to focus on whether the applicant disregarded tender procedures or not. There is nothing complex in preparing a defence to the alleged facts. The tender procedures and the selection criteria appear to have been matters that the applicant was familiar with as part of his official duties as an adjudicator of tenders. I formed the view, therefore, that labelling the charges as fraud did not add anything to the alleged misconduct."

14. Carrim's reasoning speaks for itself. His ruling is eminently reasonable and justifiable. If it is to be criticised at all, it is because he omitted to discuss the relevance of the collective agreement and what weight he attached to it in the exercise of his discretion.

15. On the issue of costs, the respondents have asked for the costs of two counsel. In my view, this is not a matter which warrants such costs. The overwhelming weight of authority in the Labour Court has been against granting legal representation at disciplinary hearings. Besides, the matter was not that complex that it warranted the costs of two counsel.

16. In the circumstances I grant an order in the following terms:

The application is dismissed with costs, such costs being the costs of one counsel only.

Pillay D, J
08/10/2003

For Applicant: Mr Mahlase

Instructed by: Mahlase, Nonyane-Mahlase

For Respondents: Mr D.I. Berger SC

Instructed by: The State Attorney