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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2262/02

HEARD ON 2003.10.27

DELIVERED ON 2003.10.28

In the matter between

NOMATHAMSANGA B VALLIHU Applicant

and

FAIZEL MOOI Respondent

J U D G M E N T

MBENENGE, A.J: This is an application for the grant of an order interdicting and restraining the respondents from continuing with their disciplinary inquiry against the applicant set down for hearing tomorrow 29 October 2003, pending the finalisation of review proceedings that have been instituted by the applicant against the respondents herein for the setting aside of a ruling of the first respondent in terms whereof outside legal representation was denied to the second respondent and the applicant, and other relief that is ancillary thereto. The applicant is the chief executive officer of the second respondent and is facing disciplinary proceedings. The first respondent has refused the parties legal representation in his ruling, which is extensively motivated.

The review application is grounded on section 6 of the Promotion of Administrative Justice Act, 3 of 2000(the PAJA). Section 3 of that Act provides that:

> "*In order to give effect to the right to procedurally fair administrative action an administrator may in his or her or its*

discretion also give a person referred to in subsection (1) [that is a person whose rights or legitimate expectations is affected by an administrative action], an opportunity to -

(a) obtain assistance, and in serious or complex cases legal representation."

The second respondent opposes the application on the ground that there is no absolute right to legal representation and that the first respondent exercised his discretion properly, leaving the ruling unassailable.

There are two preliminary issues that I should dispose of without ado; The first one is whether a case of urgency has been made out, and the second one is whether there is a proper resolution of the second respondent authorising the deponent to the second respondent's answering affidavit to champion the cause of the second respondent.

The applicant got to know of the hearing of 29 October 2003 on 15 October 2003. She thereafter engaged in consultations with her legal representatives and this culminated in application papers being drawn by 20 October, and the application itself launched on 21 October. In my view the applicant acted vigilantly and speedily prior to launching this application. The founding papers served on 21 October attracted opposition from the second respondent. I am prepared to deal with this matter on an urgency basis. It is not the contention of the second respondent that it still requires more time to deal with the applicant's allegations of fact contained in the founding affidavit. I was advised by Mr Ram, who appeared for the second respondent, that the respondent will stand or fall by its opposing affidavit on the factual and legal issues. That then disposes of the first preliminary point. In support of his allegation that he has authority to champion the cause of the second respondent Mr Magketa the deponent to the opposing affidavit has pointed to a document headed "*Resolution of Executive Committee*" which purports to have been taken in terms of items 64 and 65 of the second respondent's Constitution. The document makes it abundantly clear that a resolution of the executive committee of the second respondent was taken on 23 October 2003:

"*(a) to ratify procedures taken by the chairman of*

the second respondent on behalf of the second respondent to set aside the Anton Pillar order granted to the applicant;

(b) to institute procedures to oppose the application to the Labour Court by the applicant to restrain the second respondent from continuing with a disciplinary action against her;
(c) to institute procedures to oppose the application to the Labour Court by the applicant to set aside the ruling of the first respondent not to allow legal representation;and
(d) that Mr Magketa, in his capacity as the chairman of the second respondent be authorised to act on behalf of the second respondent on the above matters and/or in any other matter that may be presented before any authority, including any court in the Republic, in relation to the disciplinary action against the applicant, or any matter incidental thereto in the future."

The form and not the substance of the document is under attack. It brooks of no argument to the contrary that items 64 and 65 of the Constitution of the second respondent deal with procedures. Item 64 deals mainly with signatures that must be appended on a resolution before it can be said to be valid and effective. Item 65, on the other hand, provides:

> "*That a resolution shall be deemed to have been signed if consent thereto has been given in a message transmitted electronically or by telegram, teleprinter or telefax and purporting to emanate from the person whose signature to such resolution is required.*"

The question is whether the second respondent's Constitution gives it the power to resolve in the manner set out in the impugned resolution.

Item 71 provides an answer to that question. That item gives the committee of the second respondent the power to act on behalf of the second respondent in an emergency, in which event the executive committee shall report its actions and the reasons therefore to the second respondent.

In my view, substance must triumph over form. Even though the impugned resolution does not pertinently point to item 71 but to

items that are not the *fons et origo* of the power, I am satisfied that the executive committee of the second respondent has the power to authorise the deponent to champion its cause. The resolution under attack is based on that power. In my view, the reference to items that deal with meetings and procedures do not change the picture. Therefore, the second respondent has placed its opposition before me and I must cross to deal with the question whether the applicant has made out a case for the grant of the interim interdict that she is seeking.

The requisites for the grant of an interim interdict are matters of trite law: they are that there must be a *prima facie* right, an infringement of the right, and lack of adequate alternative remedy. In the view I take of this matter, an aspect of the case which effectively disposes of the application is whether there are prospects of success in the main application. Section 3 of the (PAJA) makes provision for legal representation only in serious and complex cases. An administrator decides, in the exercise of his/her discretion to grant an opportunity to obtain legal representation. This right is not cast in stone. The administrator has a discretion which is signified by the use of the word "*may*" in subsection (3) of section 3. ***In Hamata and Another v Chairperson Peninsula Technikon Internal Disciplinary Committee and Others*** 2002 (23) ILJ 1531 (SCA) it was held that there is no discernable constitutional imperative regarding legal representation in administrative proceedings other than a recognition of the need for flexibility to allow for legal representation in cases where it is truly required in order to attain procedural fairness.

The applicant has based her cause of action in the review proceedings on section 6 of the (PAJA) and, to that end, has alleged:

> "*That the first respondent took into account irrelevant considerations in reaching his decision; he considered the applicant, whilst it was the second respondent that brought the application; he treated the second respondent as a company when it is in fact not; he made assumptions about legal qualifications of the applicant's subordinates and their competence when such was not in issue; he assumed that legal representation was the cause of the delay when no evidence of such causal link was before him; he ignored or*

attached insignificant weight to relevant considerations..."

However, what is significant is the fact that in the founding affidavit the provisions of section 6 of the (PAJA) are specifically mentioned as being the cause of action of the applicant in the main application. This argument seems attractive, but loses sight of the provisions of section 7 which deals with procedure for judicial review.

Section 7(3) provides that the Rules Board for the Courts of Law, established by section 52 of the Rules Board of Court of Law, 107 of 1985, must within one year after the date of commencement of the (PAJA) make and implement rules of procedure for judicial review.

Section 7(4) provides that before the implementation of the rules of procedure, referred to in section 7(3), all proceedings for judicial review [based on the provisions of the PAJA] must be instituted in a High Court or the Constitutional Court. The rules contemplated in section 7(3) have not been published in the Gazette. They will thus not have been approved by Parliament as provided for in section 7(5). I drew the attention of the parties' legal representatives to this concern as it exercised my mind when I further perused papers after the hearing of yesterday. Mr Mahlahu, who appeared for the applicant, has argued that section 1(b)(i) of the (PAJA) provides a solution to the problem at hand. That section reads that:

> " 'Court' means a high court or another court of similar status."

His contention was that the Labour Court is the court of similar status contemplated in section 1(b)(*i)*. I do not agree with this submission. That subsection defines a "court" and not a "high court". The high court contemplated in section 7(4) of the (PAJA) does not include the Labour Court.

In my view, the main review application has no prospect of success as this court has no jurisdiction to entertain same. Further, and in any event, the application for the grant of interim relief must fail because the applicant has an alternative remedy; she has the right to challenge any finding made against her by the chairperson of the disciplinary proceedings by way of review or appeal.

O R D E R

In the result I grant the following order:

1. The applicant's application for the grant of an interim interdict pending the outcome of review proceedings that have been instituted by the applicant against the respondents for a review and setting aside of the first respondent's ruling dated 31 October 2003 is refused.

2. The applicant shall pay the costs of the hearing of 27 October 2003.

S M MBENENGE

ACTING JUDGE OF THE LABOUR COURT

ON BEHALF OF THE APPLICANT:	ADV MAHLANGU
ON BEHALF OF THE RESPONDENT:	ADV RAM