IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR551/02

In the matter between:

THEMBA MAJOLA	**Applicant**
and	
THE MEC FOR THE DEPARTMENT OF PUBLIC WORKS, NORTHERN PROVINCE	**First Respondent**
THE PUBLIC SERVICE COORDINATING BARGAINING COUNCIL	**Second Respondent**
MARUBINI TSHIVHINDA	**Third Respondent**

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J U D G M E N T

HUTTON AJ

1. This matter has a long and tortuous history. The matter commenced as an urgent application before this court on 23 April 2002 and was eventually argued before me on 18 July 2003 after numerous postponements for various reasons.

2. Upon the conclusion of argument, and in view of the fact that a number of concessions had been made by Mr Malindi, who appeared for the first and third respondents, which concessions effectively dispose of the matter, I made an order in favour of the applicant. I now set out briefly my reasons for doing so.

3. The applicant, a senior public servant employed by the Department of Public Works, Northern Province, was charged with alleged misconduct and was summoned to appear at a disciplinary enquiry to be held on 18 April 2002. It is common cause that the disciplinary code and procedures ("*the code*") contained in Resolution 2 of 1999 of the Public Service Coordinating Bargaining Council apply. It is furthermore common cause that that code has the status of a collective agreement.

Clause 7.3 (e) of the code provides that:

"*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.*"

Clause 2.8 of the code reads as follows:

"*The codes and procedures are guidelines and may be departed from in appropriate circumstances.*"

4. On 17 April 2002 the applicant's attorney addressed a letter to the Head of Department of the Department of Public Works wherein an application was made on behalf of the applicant to permit him to be represented by an attorney or an advocate at the scheduled disciplinary hearing. The applicant's attorney contended that the Constitution of the Republic of South Africa, 1996 read together with section 3(3) of the Promotion of Administrative Justice Act, Act No 3 of 2000 afforded the Department a discretion to allow legal representation notwithstanding what was set out in clause 7.3(e) of the code. The letter went on to set out certain grounds upon

which it was contended that it be appropriate to exercise a discretion in favour of the grant of legal representation.

5. On 17 April 2002 the applicant's attorney received a response from the Head of department wherein a blunt refusal of the application was communicated to him. It is clear from that letter, and this was conceded by Mr Malindi at the hearing before me, that the refusal to allow legal representation was based on a view taken that the prohibition of legal representation contained in the code was an absolute one and that the code did not give of a discretion to allow legal representation.

6. On 18 April 2002 the disciplinary enquiry commenced. It was attended by the applicant and his attorney. There is a dispute of fact as to what happened at the enquiry. The applicant contends in his papers that his attorney was unceremoniously ejected from the proceedings when the chairperson of the disciplinary enquiry, whom the applicant later sought to join in these proceedings as the third respondent, took the position that there was an absolute bar to legal representation at the enquiry. The chairperson, who deposed to an answering affidavit on behalf of the first respondent, contends that this is not so. He states in his affidavit that he in fact exercised his discretion against the applicant after considering an application to allow

legal representation at the hearing. However, it is abundantly clear from what he states in his affidavit that, on his own version, he did not hear argument on the applicant's contentions as to why he should exercise his discretion in favour of the grant of legal representation, and in particular as to the circumstances which the applicant would argue warrant the exercise of a discretion in his favour. Rather what the chairperson did, on his own version, was to hear argument as to whether or not he had such a discretion.

7. The contention raised that a discretion had in fact been exercised against the applicant gave rise to an application on behalf of the applicant to join the chairperson as third respondent in this application and to amend the relief sought to include a prayer for the review and setting aside of the third respondent's decision. The latter relief was sought in the alternative to the primary claim of the applicant which involved:

> 7.1. an application for a declarator that clause 7.3(e) of the code be held to be in conflict with the provisions of the Constitution; and

7.2. an order reviewing and setting aside the decision of the first respondent to refuse legal representation which decision had been communicated to the applicant's attorney by way of the letter dated 17 April 2002 prior to the hearing of the disciplinary enquiry.

8. In written heads of argument and in oral argument before me, Mr Malindi conceded that notwithstanding the ostensible absolute terms of clause 7.3(e) of the code, a discretion indeed vested in the first respondent to allow legal representation in appropriate circumstances. The concession made by Mr Malindi arises as a result of the judgment of the Supreme Court of Appeal in **Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and others 2002 (5) SA 449 (SCA)** where Marais JA held as follows at **458 D - E**:

> "*There may be administrative organs of such a nature that the issues which come before them are always so mundane and the consequences of their decisions for particular individuals always so insignificant that a domestic rule prohibiting legal representation would be neither unconstitutional nor be required to be 'read down' (if its language so permits) to allow for the exercising of a discretion in that regard. On the other hand, there may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relative trivial to the most grave. Any rule purporting to compel such an*

> *organ to refuse legal representation no matter what the circumstances might be, and even if they are such that the refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law.*"

9. Given this clear and authoritative pronouncement of the law in this regard, I take the view that Malindi's concession is correctly made.

10. Mr Malindi's concession saves clause 7.3(e) from the spectre of invalidity and it is accordingly not necessary for me to make any declaration in this regard.

11. In the circumstances the dispute before me narrowed itself down to the simple question of whether or not a discretion had in fact been exercised by the Head of Department on 17 April 2002. Mr Malindi was constrained to concede that this had not been done. He was furthermore constrained to concede that once this was so, then everything that followed thereafter was tainted.

12. In these circumstances I came to the conclusion that the decision taken on behalf of the first respondent on 17 April 2002 to refuse legal representation fell to be reviewed and set aside. The natural consequence of such a finding

is that the disciplinary proceedings that thereafter commenced, and ultimately led to the purported dismissal of the applicant from his post, fell to be declared invalid in their totality.

13. In these circumstances, I determined that if the disciplinary proceedings are to commence afresh, then a chairperson other than the original chairperson should be appointed to preside over the matter. I hasten to point out that my decision does not mean that the applicant is necessarily entitled to legal representation at any disciplinary hearing that may be convened. The chairperson will merely be obliged to consider any application made on behalf of the applicant for the grant of legal representation and to exercise his or her discretion one way or another having heard and properly considered the grounds upon which the applicant might reply.

14. Whilst my decision in the matter ultimately results in the joinder application and the application to amend the notice of motion to be rendered academic, I decided that it would be convenient to allow the joinder of the chairperson of the disciplinary enquiry as third respondent in these proceedings if only for purposes of clarity in the order that followed.

15. Insofar as costs are concerned, the applicant's attorney, Mr Mahlase, strenuously argued that the first respondent ought to be mulcted in costs on the attorney and own client scale. It was argued that the first respondent had put up a dishonest and disingenuous defence in the papers before me. In particular he argued the record of the proceedings before the third respondent demonstrated that the contention that the third respondent had exercised a discretion against the applicant at the hearing of the enquiry was false. Mr Malindi on the other hand argued that insofar as the record of the proceedings had not been vouched to be accurate and complete in all respects, I was not at large to make such a finding. The obligation to produce a properly certified record of the proceedings lay upon the applicant and in the light of his failure to do so, I am unable to make a definitive determination that the first respondent deliberately sought to mislead the court. In these circumstances I take the view that whilst fairness and equity require that I order the first respondent to pay the costs of this application, an order for costs on a punitive scale is not warranted.

16. As I have previously alluded to, the matter was postponed on several occasions in this court. On certain occasions costs orders were made and on other occasions the costs were reserved. On 14 May 2002 and on 28 May 2003 the costs were reserved in circumstances where I consider it appropriate

that those costs follow the result in this matter. On 29 April 2003 the matter was postponed primarily as a result of the fact that the applicant had not filed heads of argument in this court timeously in accordance with the provisions of the rules. In these circumstances I am of the view that the applicant ought to bear the costs that were reserved on that day.

17. It is for these reasons that I made the following orders:

1 Marubini Tshivhinda is joined in these proceedings as the third respondent.

2 The decision of the first respondent to refuse the applicant's request to be allowed legal representation at a disciplinary hearing which was to be heard on 18 April 2002 is hereby reviewed and set aside.

3 As a consequence of the aforesaid order, the proceedings that took place on 18 April 2002 before the third respondent are hereby declared invalid and are set aside in their entirety.

4 In the event of the first respondent reconvening a disciplinary enquiry into the alleged misconduct of the applicant, it is ordered that such proceedings shall be convened before a chairperson other than the third respondent.

5 The first respondent is ordered to pay the costs of this application, including the costs reserved on 14 May 2002 and 28 May 2003.

6 The applicant is ordered to pay the costs that were reserved on 29 April 2003.

R HUTTON
Acting Judge
Labour Court of South Africa

For the applicant:	Attorney K Mahlase Instructed by : Mahlase, Nonyane-Mahlase
Attorneys	
For the first and third respondents:	Adv G Malindi Instructed by : The State Attorney