

Sneller Verbatim/ASS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J328/03

2003-02-20

In the matter between

Applicant

and

1st Respondent

2nd Respondent

J U D G M E N T

LANDMAN J: The applicant, Ms Sophie Stambles Phakoe, is employed as a credit supervisor by Exel Petroleum (Pty) Limited, the 2nd respondent in these proceedings.

Exel charged the employee with one count of failure to disclose, in her *curriculum vitae*, that she has been dismissed by her previous employer. She was also charged with 40 counts of defrauding Exel by manipulating journal entries.

A disciplinary inquiry was convened on 28 January 2003. A non-executive director of the company, Mr John Trollip, presided at the disciplinary inquiry. He is the first respondent. Mr Jan Snyman, a legal adviser was in attendance. Mr Herman Welman, was the complainant who intended to present evidence on behalf of the company. The employee was represented by Mr Bezuidenhout, an attorney. Exel's disciplinary code provides for representation of an employee charged with an infraction. This representation was to be by "a fellow in-house permanent employee".

Mr Bezuidenhout relying on *Max Hamata and another v Chairperson Peninsula Technicon Internal Disciplinary Committee and others* a decision of the Supreme Court of Appeal (384/2000) dealing with the discipline of a student, argued that the principle has now been established that a disciplinary tribunal of a private body, that is a non-administrative organ, has a discretion to admit legal representation for a person charged with an infraction.

Mr Trollip listened to the representations made by Mr Bezuidenhout. He then gave his ruling *ex tempore*. He ruled that the employee was not entitled to be represented by Mr Bezuidenhout. The employee launched an urgent application

in this court for the following relief:

- "2. Reviewing and setting aside the decision of the 1st respondent of 28 January 2003 to the effect that the applicant may not be represented by a legal practitioner at the disciplinary hearing chaired by him.
- 2.1 Declaring that the applicant is entitled to representation by a legal practitioner at the said disciplinary hearing, alternatively
- 2.2 remitting the matter to the 1st respondent to exercise an unfettered discretion on the question of the applicant's legal representation by a legal representative at the said disciplinary hearing chaired by him."

The applicant also seeks her costs.

The matter came before me by way of urgency. I dismissed the application with costs. As the applicant's attorneys have pressed me to provide reasons for my order, my judgment will be a brief one. It proceeds on certain assumptions regarding the law which I do not decide. I assume, without deciding, that the *Hamata* decision is applicable to labour disciplinary proceedings. The issue which arises here is whether the decision of Mr Trollip is reviewable on common law grounds. The grounds of the review upon which the employee relies are set out in her founding affidavit

in paragraphs 4.1 and 4.2 which read:

"4.1 I submit that it is apparent from the 1st respondent's decision and reasons as appear from annexure 'E' that the 1st respondent has failed to exercise a discretion and considered himself not to have the power to grant legal representation based on his interpretation of the 2nd respondent's disciplinary code which he found excludes legal representation.

4.2 I am advised then in terms of the current Labour Court Law and Supreme Court of Appeal authority the 1st respondent indeed had such a discretion and failed to exercise same. I am further advised that in doing so the 1st respondent committed a reviewable irregularity."

The issues are then the following:

- (a) Did Mr Trollip accept that he had a discretion; and
- (b) If he did, whether he exercised the discretion properly i.e. not capriciously by exercising and applying his mind with slavish adherence to the usual practice and reasonably.

Mr Trollip was made aware, by Mr Bezuidenhout, that he had a discretion to admit legal representation. Mr Trollip in his *ex tempore* ruling said: "I got a discretion and I have to use it." He went on to note that the disciplinary procedures provide for

representation by a fellow employee. He considered the reasons why it might be undesirable to allow legal representation at a disciplinary inquiry. He examined the policy of the Labour Relations Act, 66 of 1995 regarding legal representation. He considered the benefits of deciding labour disputes inhouse. He expressed the view that the matter was not a complex one. Having considered all this, Mr Trollip exercised his discretion to exclude legal representation.

I find no fault with the exercise of his discretion (on the assumptions outlined above). For these reasons the application was dismissed with costs.

**SIGNED AND DATED AT BRAAMFONTEIN ON APRIL
2003**

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA