IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: J 705/01

In the matter between

PHILLIPUS LODEWICUS DE JAGER **Applicant**

and

THE MINISTER OF LABOUR **1st Respondent**

DIRECTOR-GENERAL OF THE DEPARTMENT OF LABOUR **2nd Respondent**

THEMBIE FAITH MOLEKO **3rd Respondent**

RONALD OPPELT **4th Respondent**

JUDGMENT

Revelas, J

[1] The applicant seeks to review and set aside the decision of the second respondent to dismiss him. This decision is dated 12

December 2000. In addition, the applicant seeks an order reinstating him in his position of employ with the second respondent in Bloemfontein retrospectively, as from 15 February 2001, on the same terms and conditions which applied to him as at the date of his dismissal. The applicant seeks this relief on the basis that his dismissal is void *ab initio* because he received no reasons for his dismissal, despite numerous requests for such reasons by his legal representative, Mr Frank Meaken. Several copies of letters written by Mr Meaker are testimony to Mr Meaker's fruitless efforts to obtain such written reasons.

[2] The respondents have raised a point *in limine,* contending that the dispute relating to the failure by the third respondent (the chairperson of the disciplinary enquiry) to pronounce on the final outcome of the dispute, moreover her failure to provide reasons is a new dispute about procedural unfairness, which was never referred to conciliation. Consequently, the argument goes, the Labour Court has no jurisdiction to hear the matter.

[3] The applicant's case is that the respondent's failure to comply with Regulation 2 of 1999, the applicable disciplinary and procedure code, rendered the disciplinary proceedings null and void. Consequently, the applicant seeks relief which in effect restores the position as it was prior to him being charged and dismissed. Regulation 2 was issued by the Public Service Co-ordinating Bargaining Council.

[4] In terms of clause 7.3 (l – m) of Regulation 2, the chairperson of the disciplinary hearing must inform the employee if he or she is guilty of misconduct and give reasons for such a finding (7.3 l). Before deciding on a sanction the chairperson must allow the employee an opportunity to present evidence in mitigation, and hear any evidence concerning aggravating circumstances (7.3 m). Clause 7.3 n provides that the chairperson "must communicate the final outcome of the hearing within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded in the employee's personal file". I presume "outcome" means sanction, since the finding of guilty is already made during the enquiry.

[5] The applicant was never furnished with any record of the proceedings, nor written reasons for any of the findings, nor with the report. However, he was advised of his dismissal in writing at some stage. An appeal hearing was conducted and the confirmation of the applicant's dismissal was communicated to the applicant in a letter dated 12 December 2000.

[6] Mr Meaker, on behalf of the applicant, filed an "inchoate" (the applicant's wording) notice of appeal, without a record, without notification of the final outcome, nor written reasons for any findings. The applicant argues that the ruling of the internal tribunal was invalid because, without a record and without the benefit of the *audi alteram partem* principle, the appeal could not validly confirm any ruling of the disciplinary hearing.

[7] The third respondent (the chairperson of the disciplinary enquiry) was obliged to furnish a written report on the findings and sanction to the second respondent. Apparently the second respondent was provided with such a report.

[8] The applicant, *inter alia*, relies on the provisions of section 5(1) and 5(2) of the Promotion of Administrative Justice Act, 3 of 2000 ("the PAJA"), which provides that:

> "**Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within ninety days after the date on which that person became aware of the action or might reasonably have been expected to become aware of the action, request that the administrator concerned furnish written reasons for the action.**"

[9] The applicant also sought to rely on section 63(4) of the Labour Relations act, 66 of 1995, as amended ("the Act"), which enables any party to an unresolved Labour dispute to refer it to the Labour Court for adjudication.

[10] On the facts of this matter the third respondent did not comply with Regulation 2, and in particular not with clause 7.3(n) in that the final outcome of the hearing was not communicated to the

employee (the applicant) within five days. It is not clear when it was furnished.

[11] Until the day the matter was argued, no copy of the record of the disciplinary hearing was even before court. The applicant's attorneys of record (his third set of representatives) were not given a copy. Only upon my insistence, did counsel for the respondents, "lend" me his copy of the record. He submitted that it was the applicant's duty to place the record on the file. The applicant had no record and the correspondence clearly demonstrates that any request from the applicant's erstwhile representatives was ignored. Counsel for the respondents stated from the bar that since there was some dispute between the respondents and Mr Meaker regarding his entitlement to represent the applicant, the respondents were not obliged to respond to Mr Meaker's letters.

[12] The third respondent argued firstly, there was sufficient compliance with Regulation as she furnished a report and a recommendation to the second respondent within five days and furnished reasons for her decision on the merits, during the hearing. Secondly, the respondents argued that the dispute declared by the applicant was a dispute relating to the failure of the third respondent to pronounce upon the final outcome. As such, it is a new dispute which was never referred to conciliation. Consequently, the argument went, the Labour Court may not adjudicate that dispute (the point in limine).

[13] Whatever the excuses are for not responding to Mr Meaker, or to the applicant for that matter, the respondents fall foul of section 5 of the PAJA which provides that:

> "**Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within ninety days after the date on which that person became aware of the action or might reasonably have been expected to become aware of the action, request that the administrator concerned furnish written reasons for the action." (my emphasis)**

[14] Section 6(2)(b) of the PAJA provides further, that a court has the power to judicially review any administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. In this matter, I have already found that Regulation 2 was not complied with. Furnishing only oral reasons during the enquiry for the finding of guilty, and nothing else, is not compliance with Regulation 2.

[15] The next question is whether the word "court" in the aforementioned section, included the Labour Court. Section 157(2) of the LRA empowers the Labour Court to enjoy concurrent jurisdiction with the High Court of South Africa in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa,

108 of 1996 ("the Constitution"), arising from employment relations. It follows that the Labour Court is included in that definition.

[16] The respondents contended that this matter should have gone the arbitration route as an unfair dismissal dispute and the alleged non-compliance with Regulation 2 (which the respondents dispute) would then be addressed as "procedural unfairness". In other words, the respondents would have it, the respondent's failure - or deliberate refusal as it would appear – to furnish **written** reasons is a mere procedural defect, which could be dealt with at an arbitration hearing, preceded by conciliation.

[17] I was also informed from the bar that Mr Benjamin, who represented the applicant at the hearing, was given a copy of the record. In this regard the applicant's representatives could not be of assistance.

[18] The record of the proceedings reflect that the applicant was found guilty of the charges levelled against him, of which eight related to claiming standby allowances without approval of the necessary authority. He was also found guilty of three other charges relating to alleged disloyalty to the Department of Labour. The third respondent gave no reasons for her decision then. She said it would be contained in her report. When she insisted that she wanted to hear argument on mitigating circumstances, it was pointed out to her that since she did not give reasons for her "verdict", that would

be difficult. She then suggested that her report should be awaited. That was deemed not in accordance with "procedure" (probably clause 7.3 of Regulation 2).

[19] The second respondent then adjourned the proceedings for a while. On her return, she gave reasons for her findings of guilty on the eleven charges. The record clearly reflects thus. The report also contains reasons for the findings of guilty. In the same report the second respondent set out her reasons for concluding that dismissal was the appropriate sanction. She also made a strong credibility finding against the applicant, whom she viewed as "extremely dishonest". Her report is dated 30 October 2000.

[20] Having read the record and the third respondent's report, which only came to hand during argument, it is apparent therefrom that the applicant heard during the hearing at least, what the reasons for the third respondent's verdict was. This he should have told Mr Meaker. On the affidavits of the various parties, I cannot make a determination as to whether the applicant or Mr Benjamin received a copy of the record and the third respondent's report.

[21] As pointed out, above, the provisions of Regulation 2 were not complied with, since the applicant was not given written reasons. That is a procedural irregularity. It is simply not true that he was not given any reasons for the finding of guilty. The applicant knew enough about the reasons for his dismissal, to enable him to proceed with arbitration. There is no need to set aside the

disciplinary hearing and the third respondent's findings.

[22] For the sake of certainty and in view of the fact that there was no record of the proceedings before court, I will make an order that the record and report be made available to the applicant.

[23] Insofar as costs are concerned, I must say that I seriously doubt whether this application would have been necessary if the respondents adopted a more co-operative approach towards Mr Meaker, and simply sent him a copy of the report and the record. Therefore the respondents should bear the costs of this application, even though the applicant was unsuccessful in his quest to have the disciplinary hearing and its outcome set aside as null and void.

[24] I make the following order:

1. The second respondent is to furnish the applicant with a copy of the record of the disciplinary hearing held in October 2000, and a copy of the third respondent's report dated 30 October 2000, in respect thereof.

2. The first respondent is to pay the costs of this application.

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Judge Elna Revelas
Judge of the Labour Court

Date of hearing: 02 February 2006

Date of judgment: 10 February 2006

On behalf of the applicant:
Adv. Clint Ascar instructed by Salgado Inc

On behalf of the second respondent:
Adv. G. Modau instructed by the State Attorney