IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J2353/08

In the matter between:

BOPAPE, DAPHNE RASIBE MATLAKALA Applicant

and

UNIVERSITY OF SOUTH AFRICA First Respondent

BAYIJNATH, N PROFESSOR Second Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application for the review and setting aside of the decision of the second respondent acting as chairperson in disciplinary proceedings convened by the first respondent against the applicant. The decision sought to be reviewed and set aside is one by which the second

respondent refused to allow the applicant legal representation in those disciplinary proceedings by a person who is not an employee of the first respondent. This decision appears to be grounded in the first respondent's policy that in disciplinary proceedings an employee has the right "to be represented by a colleague of his choice or by a shop-steward – either one being an employee of the Technikon". In other words, outside counsel, so the second respondent believes, is not permitted in first respondent's internal disciplinary proceedings.

[2] The applicant also seeks an order declaring clauses 2 and 5.23 of the first respondent's policy to be "unreasonable, irrational and unconstitutional and thus be set aside". Clause 2 is the one quoted above as limiting representation at the first respondent's disciplinary hearings to shop stewards and/or employees of the first respondent. Clause 5.23 reads:

> "Under no circumstances will outside lawyers or IR consultants be allowed to interfere with the internal disciplinary processes of the [first respondent]."

[3] In supporting this prayer the applicant seeks to invoke the provisions of the Constitution of the Republic of South Africa, 1996, Act 108 of 1996 ("the Constitution") and those of the Promotion of

Administrative Justice Act, 3 of 2000 ("PAJA"). The first respondent disputes that PAJA is applicable in relation to the decision of the second respondent in refusing the applicant the services of an outside attorney.

[4] Because of the view I take of this matter, it is not necessary to decide whether the policy provisions sought to be impugned are unreasonable, irrational or unconstitutional. Consequentially, it is also unnecessary to decide whether or not, in making the ruling he made, the second respondent was performing an administrative action within the meaning of PAJA.

Common Cause Facts

[5] The following facts are common cause.

[6] The applicant was appointed by the first respondent as regional director on a five year contract from 1 January 2006 until 31 December 2010.

[7] On 19 June 2008 she was suspended from duty on full pay on allegations of gross negligence in the performance of her duties and disregarding a lawful instruction.

[8] On 5 September 2008 she received a notice to attend a disciplinary hearing on the same charges.

[9] The notice informed her that although she was entitled to representation during and after the disciplinary hearing, such representation had to be either by a union member or an employee of the first respondent but "not outside people".

[10] At the commencement of the disciplinary hearing on 15 October 2008 the second respondent ruled that the applicant

> "is entitled to representation, but that representation has to be internal. I will not allow external representation in this matter."

[11] The basis for the ruling was, according to the second respondent, that

> "[t]hese hearings are generally internal affairs. We keep it so to avoid them coming unnecessarily protracted and legalistic. . . . What I am guided by is what the intention of the employer

> is. . . . It is saying that the matter should be kept internal. That's a very important stipulation. And therefore, it is for that reason that it's been quite specific, that it should be by a colleague of his choice . . . or by a shop-steward, either of one being an employee of the [first respondent], and that is the operative phrase them, being an employee. So the representation has to be internal." [sic]

page 9 of transcript of disciplinary proceedings

[12] The second respondent postponed the disciplinary hearing, because he considered the matter "very serious", in order to enable the applicant to challenge his ruling in court.

[13] The first respondent's "initiator" or evidence leader at the disciplinary proceedings is neither an employee of the first respondent nor a shop-steward. He is an IR consultant.

[14] The first respondent is of the view that the second respondent has no discretion to allow outside representation at its disciplinary hearings.

para 18 of the opposing affidavit

[15] The second respondent also considers himself bound by what he considers to be the meaning of the first respondent's policy as regards representation at disciplinary proceedings, which he understands as conveying a clear intention of the first respondent.

para [11] above

The Dispute

[16] It seems to me the determination of this matter turns on whether or not, on a proper construction of the relevant provisions of the first respondent's policy, the second respondent has any discretion to allow outside representation for the applicant in its internal disciplinary hearing.

[17] In argument before this Court, Mr van der Westhuizen for the respondents submitted that this Court should not entertain this application because if it should find that the second respondent does have discretion to allow outside representation, it will have to refer the matter back to the second respondent for the exercise of that discretion. If, in the exercise of his discretion, the second respondent were to refuse outside representation, that same issue may eventually come back to this Court on review. For that reason, he submitted that the disciplinary hearing ought to be allowed to continue so that all issues arising therefrom can be dealt with *holus bolus* in due course and not piece-meal. This point was never foreshadowed in the papers. In any event, this submission presupposes that the second respondent will make an adverse ruling against the applicant both on the discretion

issue and on the merits of the charges against her. One should not speculate about the outcome of the disciplinary proceedings.

The Review

[18] The application is for the review of the second respondent's ruling in a disciplinary hearing. The scheme of the Labour Relations Act, 66 of 1995, ("the LRA") is that employees who are aggrieved by an unfair suspension or any other unfair disciplinary action short of dismissal have recourse to the CCMA and, only if they do not get joy there, to this Court. Mr Mahlase for the applicant has pointed to no authority (and I am not aware of any) allowing an employee in such a situation to challenge the employer's conduct directly in this Court without first going through the conciliation and arbitration process at the CCMA. This issue may well be successfully conciliated there.

[19] In light of the general scheme of the LRA, it is in any event questionable whether an employee can permissibly challenge an interlocutory ruling of a disciplinary committee (even if it fits the definition of "unfair labour practice" in section 186(2) of the LRA) directly in this Court.

[20] While section 158 of the LRA confers wide powers on this Court, the matter referred to it must still fall within its jurisdiction before it can invoke those powers. The power conferred on this Court by section 158(2)(b) is not an option because, assuming that the second respondent's ruling constitutes an unfair labour practice, the appropriate forum to determine that issue would be the CCMA and this Court could not readily assume jurisdiction and step into the shoes of the CCMA because that requires the consent of the parties. Since the first respondent disputes this Court's jurisdiction at this stage, the propriety of this Court assuming jurisdiction would be in doubt.

[21] The remaining option would be for this Court itself to refer the issue to the CCMA pursuant to section 158(2)(a) of the LRA. But the applicant does not allege unfair dismissal or unfair suspension. Neither has Mr Mahlase in argument. What is sought is rather to set aside a disciplinary committee's refusal to allow the applicant outside representation in an internal disciplinary hearing. It has not been argued before this Court that the second respondent's ruling constitutes an unfair labour practice which is capable of being referred to the CCMA under section 191. For that reason it is not open for this Court to assume that this is indeed so.

[22] I should mention that in my view the principle in *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Other* (2002) 23 ILJ 1531 (SCA) is equally applicable on the facts of this case. In that case, the Supreme Court Appeal found, on common law considerations, that a provision similar to rule 2 in this case did not preclude the exercise of discretion on the question of whether or not to allow outside representation. I respectfully agree. There is nothing in rule 2 of the first respondent's policy to suggest that the second respondent has no discretion whatsoever in relation to the permissibility of outside representation. In the exercise of that discretion, the second respondent would have regard to the factors referred to in *Hamata*.

[23] But the applicant has, in my view, jumped the gun in heading directly to this Court at this stage. If it is any consolation, it is still open to the applicant to refer the issue to the CCMA if it is an issue capable of such referral.

Finding

[24] In the result the application cannot succeed.

Costs

[25] I do not believe that a costs order is warranted against the applicant in the circumstances of this case. In any event, the first respondent did not press the issue in argument and advanced no grounds for the punitive costs order it seeks in the answering papers.

_____

Ngalwana AJ

Appearances

For the applicants:	*Mr Mahlase*
Instructed by:	*Mahlase Nonyane-Mahlase Attorneys*
For the respondents:	*Mr G van der Westhuizen*
Instructed by:	*MacRobert Inc*
Date of hearing:	*11 November 2008*
Date of judgment:	*17 November 2008*