182/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO 708/89

In the matter between

THE MINISTER OF WATER AFFAIRS — Appellant

and

GREGORY MANGENA AND 25 OTHERS — Respondent

CORAM: HOEXTER, KUMLEBEN, GOLDSTONE, JJA et

NICHOLAS, HOWIE, AJJA

DATE HEARD: 20 AUGUST 1992

DATE DELIVERED: 28 SEPTEMBER 1992

J U D G M E N T

GOLDSTONE JA:

The respondents were all employees of the Department of Water Affairs. The appellant is the Minister responsible for that department. It is common cause that the respondents were employed pursuant to the provisions of s 3(2) of the Water Act, 54 of 1956 ("the Act"). Insofar as it is now relevant, it is there provided as follows:

> "(2) The Minister may from time to time appoint such temporary engineers, surveyors, clerks or other employees as may be necessary to enable the functions of the department to be exercised: Provided that-

(a) appointments made in terms of this sub-section shall be limited to duties performed at the site where the department is engaged in actual constructional or investigational work or which bear a direct relationship to specific projects or schemes under construction or under investigation;

(b) ..."

The respondents were all initially employed on the Palmiet Government Water Scheme at Grabouw. During the second half of 1987 they were transferred to work on the Bissets Drift project which is part of the Riviersonderend Government Water Scheme. They were housed at Ruensveld West, Grabouw.

It is alleged on behalf of the appellant, and not disputed by the respondents, that the actual

construction and investigation work at the Bissets Drift project ended on 30 June 1989.

The respondents were dismissed on notice by letters dated 26 May 1989. In the case of six of the respondents the dismissal was to take effect from 1 October 1989. In the case of the rest of them it was to take effect from 1 July 1989. The letters, except in regard to the date of termination, read as follows:

> "OORTOLLIGE PERSONEEL: RUENSVELD WES
> Weens die algemene afname in die werksaamhede van die Direktoraat Konstruksie, spyt dit my om u mee te deel dat die Departement nie verder van u diens gebruik kan maak nie en dat u oortollig verklaar word met ingang van 1 Julie 1989. U laaste werksdag is dus 30 Junie 1989."

The temporary employees employed on the Bissets Drift project, other than the respondents, were transferred to other projects of the department. In that regard an assistant engineer employed by the department, Mr Gideon Stefanus du Plessis, said the following:

3. "Dit is my Departement se beleid om, waar die dienste van persone wat, soos die Applikante in die onderhawige geval, kragtens die bepalings van artikel 3 (2) van die Waterwet by die Departement in diens is, nie verder benut kan word nie, pogings aan te wend om hulle op ander projekte van die Departement, wat kragtens Hoofstuk V van die Waterwet uitgevoer word, in diens te neem. Dit is vir diè rede dat ek, nadat die Departement op 20 April 1989 besluit het om werk aan die projek soos voormeld te staak, Mnr M.S. HARTY (die meganiese voorman), Mnr C.P. DU TOIT (die werkevoorman) en Mnr P.A. LAROS ('n assistent ingenieur) wat in nouer kontak met die verskillende werkers as ekself was, versoek het om rapporte aan my te verskaf aangaande elkeen se behendighede en ervaring. Nadat die gemelde persone op die versoek gereageer het, het ek oor 'n tydperk van 2 tot 3 weke navrae gedoen by ander projekte van die Departement in poging om arbeiders in geskikte vakatures geplaas te kry. Die pogings - behalwe vir werkers wat verkies

> het om oortollig verklaar te word en Applikante Nr 2 tot en met Nr 26 - was suksesvol gewees. In weerwil van die feit dat ek selfs na die 26ste Mei 1989 pogings aangewend het om vir die Applikante op ander projekte in diens geneem te kry, was ek nie daarmee suksesvol nie omdat daar nie enige vakatures bestaan het nie. Geen vertoë wat deur of namens die persone tot my of die Departement gerig sou kon geword het, kon die posisie affekteer nie, omdat daar geen vakatures bestaan het nie."

The respondents approached the Court a quo for an order declaring that their dismissals were null and void. They founded their application on two grounds. The first was that they were not given a hearing and the second was that the functionary of the Department of Water Affairs who purported to dismiss them had no authority to do so.

The learned judge a quo found for the respondents on the second ground and made an appropriate declaratory order in their favour.

In a judgment handed down in this Court on 20 August 1992 in the case of Administrator of Natal v S A Sibiya and Another, Case No 100/91, it was held that where an employer is a public authority, a decision by it to dismiss an employee, whether on notice or otherwise, involves the exercise of a public power. Such a power has to be exercised regularly and in accordance with the principles of natural justice, including the principle of audi alterem partem. As it was put in the judgment:

> "In the instant case a just and proper exercise of the power to dismiss involved an inquiry into the individual circumstances of each of the workers whose retrenchment was being considered."

It was added that:

> "... elementary fairness required that the respondents should have been accorded a hearing before the appellants took their decision to dismiss the respondents."

On the face of it the judgment in the Sibiya case is wholly applicable to the facts of the present case. The appellant decided to retrench part only of the temporary labour force which was employed on the Bissets Drift project. It was decided unilaterally which of the employees would be kept on and which would be dismissed.

However, Mr Visser, who appeared for the appellant, submitted that the employment of the respondents terminated automatically on 30 June 1989 when the work on the Bisset Drift project came to an end. That made the notices of dismissal unnecessary and irrelevant. It also followed, so it was argued, that the

audi alteram partem principle was not of application in the present case.

Mr Visser's submission was founded upon the terms of the proviso contained in s 3(2)(a) of the Act which is set out above. It followed, so counsel submitted further, that an appointment once made would terminate automatically when the project or scheme was completed.

I do not agree. In the first place the words preceding the proviso give the Minister an unfettered power to appoint temporary employees. The sub-section does not limit the terms upon which he may appoint them either generally or in respect of the duration of their employment. Mr Visser's argument treats the proviso as an independent enacting clause. That is a fallacious method of interpretation: see Mphosi v Central Board for Co-operative Insurance Ltd 1974(4) SA 633(A) 645 A-F. The principal matter to which s 3(2) applies is the

employment of temporary employees. The proviso does no more than limit the circumstances in which those employees may be appointed.

Apart from being fallacious, the interpretation contended for by Mr Visser would result in the anomaly that an employee would not know when, or if, his employment had come to an end. That would depend upon facts not likely to be within his knowledge. This unusual and unhappy situation could neither have been intended nor contemplated by the legislature.

It follows that on a proper construction thereof, proviso (a) to s 3(2) of the Act limits only the Minister's power to make appointments in terms of the substantive part of the sub-section. It places no limitation on the terms of any appointment made by him. I might add that the officials in the department so understood and so applied the provisions. They did not act on the basis that the employment of any of the

employees came to an end when the Palmiet Government Water Scheme was completed in 1987 or when the Bissets Drift project was completed in 1989. In both cases they decided which of the employees should be transferred to other places of work. Furthermore, the department's standard form of contract in respect of temporary employees, which forms part of the appeal record, contains terms which are inconsistent with a fixed-term contract. It makes provision for transfer for other duties (clause 5) and for termination on notice (clause 10).

It was thus necessary for the appellant to give to the respondents notice of termination of their services. In addition, they were entitled to a prior hearing. They were not afforded one. On that account their dismissals were a nullity. It is consequently unnecessary for this Court to consider the question

relating to the authority of the functionary who purported to dismiss them.

The reliance upon proviso (a) to s 3(2) of the Act was raised for the first time on appeal by Mr. Visser, who did not appear in the Court a quo. As counsel for the respondents and members of the Court had no prior notice of this point, counsel on both sides were requested to furnish the Court with additional written argument. They did so in a manner which was most helpful and for which the Court is indebted to them.

The appeal is dismissed with costs.

R J GOLDSTONE
JUDGE OF APPEAL

HOEXTER JA)
KUMLEBEN JA)
NICHOLAS AJA) CONCUR
HOWIE AJA)