



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, IN PORT ELIZABETH

JUDGMENT

Reportable

Case no: P 27/13

In the matter between:

MENDOE DUKADA

Applicant

and

**THE MEC: DEPARTMENT OF
PROVINCIAL PLANNING AND
TREASURY- PROVINCE OF EASTERN
CAPE**

First Respondent

**THE HOD DEPARTMENT OF
PROVINCIAL PLANNING AND
TREASURY-PROVINCE EASTERN CAPE**

Second Respondent

MR WESLEY PRETORIUS

Third Respondent

Heard: 8 FEBRUARY 2013

Delivered: 28 MARCH 2013

Summary: When the respondent has successfully proved that the matter in the founding affidavit is irrelevant and prejudicial to its defence, its application to strike out such matter must succeed. The presiding

officer's failure to find a competent representative for the Department inside and outside the civil service who is not a legal practitioner is a manifestation of his failure to apply his mind and renders such decision reviewable.

JUDGMENT

LALLIE, J

Introduction

[1] This application was brought on an urgent basis for an order reviewing and setting aside the ruling of the third respondent in which he granted the Department of Provincial Planning and Treasury of the Eastern Cape (the Department) and the applicant leave to be legally represented in a disciplinary enquiry investigating allegations of misconduct against the applicant.

Background Facts

[2] The applicant is employed as Deputy Director General: Assets and Liability Management at the Department. The finances of the Eastern Cape Province (the Province) are her main responsibility. The applicant was placed under precautionary suspension on 20 September 2012 pending the finalisation of the investigation into alleged acts of misconduct levelled against her

[3] In the notice of intention to suspend the applicant she was informed that the reason for her suspension was gross insubordination for her alleged refusal to obey a lawful and reasonable instruction of the Provincial Coordinating Monitoring Team (PCMT) committee and/or Superintendent General for Provincial Treasury for her deliberate failure to process the appointment of doctors. On 15 November 2012 the applicant was served with a notice of disciplinary hearing containing the following charges:

'3.1 Charge 1

Gross insubordination in that on or about 5 September 2012 you deliberately refused to obey lawful and reasonable instructions of the Superintendent-General of Provincial Treasury and/or the PCMT Committee in that you failed to process the appointment of certain doctors, which appointments were duly authorised.

In so doing your actions prejudiced the administration and efficiency of the department and /or caused embarrassment to your employer.

3.1 Charge 2

Intimidation and /or victimisation of fellow members/employees, more particularly management and staff in programme 3 including conduct which displayed disrespect towards others in the workplace amounting to abusive and /or insolent behaviour, in that:

3.1.1 You have repeatedly belittled managers in programme 3 including chief directors, in management and other meetings, referring to such employees as “incompetent” and/or “useless” and/or lazy in the presence of their peers and/or subordinates.

3.1.2 Forcing senior managers to agree to unrealistic and unfair performance targets in their annual performance agreements and conducting unfair performance appraisals in the last formal assessment of such employees.

3.1.3 Unnecessary and/or unwarranted and/or obstructive interference in the task, duties and outputs of managers in programme 3, more particularly by refusing to authorise necessary expenditure and /or constantly and unnecessarily changing outputs and deliverables and/or instructing managers to perform task outside of their duties and the programme and/or preventing managers from interacting with stakeholders departments and/or refusing valid leave requests and/or taking away the decision making powers and functions of managers within the programme.

3.3 Charge 3

Displaying disrespect towards managers in other stakeholder departments and/or behaving in an unprofessional manner thereby bringing the department into disrepute, (including complaints from the senior managers at the Eastern Cape Department of Health and its Head of Department)

Incapacity

Alternatively to charge 1,2 and 3 aforesaid it is alleged that you are unable to work in harmony with your colleagues and/or to fit into the employer's corporate culture. In the circumstances it is alleged that this is an irremediable breakdown in the working relationship premised on incompatibility.'

- [4] The disciplinary enquiry with the third respondent as the chairperson sat on 20 November 2012. It was adjourned and reconvened on 14 January 2013. The Department applied for legal representation. The application was opposed the applicant. On 22 January 2013 the third respondent issued a ruling in which he granted the Department's application and extended the right to be legally represented to the applicant. It is that ruling which is the subjects of this application.

Application to strike out

- [5] The first and second respondents made an application to strike out certain paragraphs of the founding affidavit on the grounds that they are scandalous and vexatious. The relevant paragraphs are the following:

'...will result in a protracted and exceedingly legalistic, forced and artificial disciplinary case which will not be concerned with the simple question as to whether or not I have misconducted myself and if so, whether or not continued employment remains feasible. It is apparent that the instruction is to secure my dismissal at all costs and a legal team has been employed to give effect to that instruction. So much ought to be apparent from the following statement contained in the

Department's submissions in support of its application to be granted legal representation.

Incompatibility is an extremely complex and developing concept and technical expertise is required to establish its existence. Extensive and effective consultation will be required with these witnesses and their evidence will have to lead (sic) by seasoned and experienced labour law practitioner in a coherent and orderly fashion, in order to link up the factual premise of the complaint to the applicable legal principle.

- 5.1 Paragraph 10.5: In fact it is common cause (or at least it was not disputed), that such exposure to legal fees will in all probability be in the region of hundreds of thousands of rands. Given personal experience and the nature of my position within the government I also know that this is an objective fact;
- 5.2 Paragraph 10.34: Should I appoint a reasonably "seasoned and experienced" legal representative (not a legal team as the Department did, I might add) to assist me in the meeting this is highly technical and (in my view) artificial case and in order to ensure that I receive a reasonably fair disciplinary hearing, I will inevitably be exposed to massive legal costs.
- 5.3 Paragraph 15: It should immediately be noted that in a province where a financial control is notoriously poor and where there is an unfortunate tendency to incur financial debt contrary to the law I often find myself in conflict with official and/or politicians in executing my primary function, i.e. ensuring that proper financial control is maintained in accordance with the law.
- 5.4 Paragraph 16: Unfortunately it should also be noted that in a rampant culture of corruption and self-enrichment there are many individuals who consider it as an obstacle to their personal agendas that proper financial control is maintained in respect of public funds.

5.5 Paragraph 17: I verily believe that both of the aforesaid two factors are underlying to the actions and treatment I am currently being exposed to. However, I am advised that these underlying motives are issues which should be properly raised during the disciplinary hearing and that it is neither necessary nor appropriate to deal with the same in any details during these proceedings.

5.6 Paragraph 18: I am of course also aware of the fact that irrespective of any sinister motives underlying to the disciplinary action against me, it remains incumbent upon me to establish my innocence in respect of the actual disciplinary charges. I indeed have every intention to do so.

5.7 Paragraph 33: The additional charges are a clear indication that the disciplinary proceedings against me are not bona fide and that same are informed by ulterior motives. Self-evidently I have been subjected to nothing but a witch-hunt and it is rather shocking that the opportunity was utilised to provide certain disgruntled subordinates who are in fact under performance management, with an opportunity to discredit their superior and to deflect attention away from their own incompetence and poor work performance. I shall, to the extent necessary, deal with these issues in the disciplinary hearing

5.8 Paragraph 35: Against the background of my belief that the disciplinary proceedings against me are not bona fide actions in response to bona fide allegation of misconduct, I was immediately concerned with the fact that the third respondent was appointed to chair the disciplinary hearing given that:

5.8.1 It is known to me the Third Respondent has a business relationship with several government departments in the Eastern Cape and more specifically that he is doing a lot

of work for the Department of Health (the Superintendent-General of which is the main complainant in respect of the subordination charge and who has in fact secured the Third Respondent's services for the Department in somewhat controversial circumstances);

5.8.2 It was my understanding that the Third Respondent and the Department's appointed initiator often acted interchangeably as chairperson and initiator in disciplinary proceedings within the public sector; and

5.8.3 The Third Respondent had previously represented me in a disciplinary matter with the Department and I considered it inappropriate for him to function as a Disciplinary Chairperson in a matter where his former client is the accused.

5.9 Paragraph 36: For the reasons to be dealt with more fully below, I was of course also most dissatisfied with the fact that the Department intended to utilise legal representation in the disciplinary hearing.

5.10 Paragraph 37: I accordingly instructed my attorney to write a letter to the second respondent inter alia objecting to the appointment of a legal representative as the initiator and objecting to the third respondent's appointment as a Chairperson. A copy of the said letter dated 19 November 2012 is attached as Annexure MD-5.

5.11 Paragraph 38: At the disciplinary hearing which convened on 20 November 2012 the proceedings were adjourned for the purposes of me bringing a formal application for the recusal of the third respondent as chairperson.

5.12 Paragraph 39: I shall not burden not burden the Honourable Court with the various papers filed in this regard. Suffice to state that the Chairperson dismissed the recusal application and that I have subsequently

recorded that my further participation in the hearing is under protest and with full reservation of rights.

5.13 Paragraph 40: Likewise I shall not burden the Honourable Court with the various further correspondences between the legal representatives and the third respondent and the third respondent's ruling in respect of issues not directly relevant to the issue now serving before the court.'

- [6] The first and second respondent's main reason for seeking to strike out the matter refer to above is that it consist of irrelevant allegations which do not take the applicant's case further. It also clouds the issues. The applicant's basis for opposing the application to strike out is that the paragraphs in question are relevant and provide the court with enough information to make its determination. Without them she will be prejudiced in her effort to prove her case.
- [7] Rule 6(3)(c) requires the founding affidavit to clearly and concisely set out a statement of material facts, on which the application is based. For facts to be material they must be essential and relevant to the application. The application before me is an application to review and set aside the third respondent's ruling allowing legal representation in the applicant's disciplinary enquiry. While the applicant's intention of including the paragraphs in question are good, when scrutinised they do not pass the test of relevance. The applicant's fear that in their absence her application will lack the necessary allegations has no basis. When the applicant's founding affidavit is read without the paragraphs in question, it still contains all the necessary allegations on which she relies for the relief she is seeking.
- [8] The allegations in question are mainly attacks on the third respondent which are of no relevance to the review application as the applicant is not seeking an order for the setting aside of the third respondent's decision not to recuse himself. They include attacks on the conduct of politicians and government officials. They do not assist the applicant in proving her

claim. The first and second respondents will be prejudiced in the conduct of their defence if their application is not granted. In the premises, the application to strike out is granted.

The Ruling

[9] In the Ruling the third respondent states that the grounds on which the Department relied upon in its application for legal representation are mainly that as the chairperson of the disciplinary enquiry, the third respondent had the discretion to determine whether or not to allow legal representation. It was also the Department's submission that given the particular circumstances of the matter before the third respondent, it would be unfair to deny it legal representation.

[10] The applicant opposed the application on the basis that, it was premature, provision of the disciplinary code prohibits legal representation, the third respondent did not have any residual discretion to allow legal representation and that the Department had waived its right to legal representation. The applicant further submitted that legal representation was not warranted in the particular circumstances of the matter before the third respondent. The applicant's argument was based on clause 2.7(3)(e) of the Senior Management Services Handbook (the SMS handbook or the handbook) which provides as follows:

'In disciplinary hearing, neither the employer nor the member may be represented by legal representative practitioner, unless the member is a legal practitioner.'

[11] The third respondent decided that the provisions of the handbook constitute guide lines which may be departed from and found that the circumstances of the matter before him warranted such departure. He also found that he had discretion to allow legal representation and that the Department did not waive its right to legal representation. Finally, he found the Department entitled to legal representation and the applicant similarly entitled.

Grounds for review

- [12] The applicant submitted that the third respondent's ruling is *ultra vires* and/or unlawful in that he erred in not adopting the approach that he was obliged to follow the clear, unambiguous and plain language of the handbook which provides that in a disciplinary enquiry neither the employer nor the member may be legally represented unless the member is a legal practitioner. Chapter 7 of the handbook provides that the procedures contained in it must be followed in disciplinary matters. A legal practitioner is defined in the handbook as a person who is admitted to practise as an advocate or an attorney in South Africa.
- [13] The applicant submitted that the third respondent did not properly apply his mind to a number of issues in reaching his ruling. The issues include the virtually unlimited pool of initiators who are not legal practitioners at the Department's disposal as the code permits the appointment of an initiator from both the entire civil service and the South African population. The perceived seriousness of the charges against the applicant which could lead to her dismissal did not justify the departure from the prohibition against legal representation as the charge the third respondent based his reasoning on seriousness is incompatibility. It is incorporated to the alternative charge of incapacity and in terms of the applicant's conditions of employment the Department may not pursue incapacity proceedings against her by way of misconduct proceedings. The applicant will be prejudiced if she elects not to be legally represented and should she chose otherwise she will be equally prejudiced by the astronomical legal fees involved.
- [14] A further ground the applicant sought to rely upon is that if the third respondent had a discretion to exercise, he exercised it incorrectly and in a grossly unreasonable manner which infringed upon her rights in terms of her conditions of service, subordinate legislation and her general right to a fair process.

- [15] The applicant's submission that the third respondent lacked the discretion to determine legal representation is based on her interpretation of clause 2.7(3) (e) of the handbook. The applicant argued that the handbook constitute subordinate legislation which the third respondent should not have easily departed from. The departure was unwarranted and ultra vires as the unambiguous language used in the handbook should have been given its literal interpretation. She sought to rely, *inter alia*, on *Mosena and Others v Premier Northern Province and Other*¹ *MEC: Department of Finance, Economics Affairs and Tourism, Northern Province v Mahumani*² and *SA Police Services v Public Servant Association*.³ The first and second respondents correctly argued that the present matter can be distinguished from the cases the applicant sought to rely on in which legal representation was prohibited by a collective agreement binding on both parties.
- [16] In determining whether the third respondent acted ultra vires and unlawfully in deciding that he had the necessary discretion to make the determination. I have considered the validity of the applicant's argument that the correct interpretation of clause 2.7 (3) (e) is that the Minister can unilaterally decide to deny parties in a disciplinary enquiry of the right to legal representation. In *Hamata and Others v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others*,⁴ the court acknowledge that there may be administrative organs which are faced with issues, and whose decision may entail consequences, which range from the relatively trivial to the most grave. Any rule requiring the organ to reject requests for legal representation in all circumstances was found unacceptable. In *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani (supra)* notwithstanding the provisions of a collective agreement against legal representation in disciplinary inquiry, the court held that in cases where an accused employee seeks legal representation such request should be seriously

¹ Unreported case number 1401/2000(LC),

² (2004) 25 ILJ 2311 (SCA).

³ 2007 (3) SA 521 (CC).

⁴ (2002) 23 ILJ 1531 (SCA) at para 12.

considered. In *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others*⁵ the constitutional court highlighted the right to administrative action that is procedurally fair.

- [17] The above decisions demonstrate the necessity for the parties to at least request legal representation. A literal interpretation of clause 2.7 (3) (e) may find themselves having to represent their own cases in circumstances where they lack the necessary ability leading to miscarriage of justice. The ruling reflects that the third respondent based his decision not only on a few clauses of the handbook but on the entire relevant chapter a proper reading of which justifies the ruling. The third respondent's interpretation that a proper construction of clause 2.7 (3) (e) does not obliterate his discretion to determine legal representation is consistent with the spirit of the handbook, the constitution and decisions of our courts. It is therefore lawful and not *ultra vires*
- [18] On the issue of the reasonableness of the manner in which the third respondent exercised his discretion the Department submitted because of the complexity of the charges proffered against the applicant it lacked internal capacity to present its case competently, and it was the public interest that it will be legally represented. The applicant's version was that the Department's submissions were without merits.
- [19] Clause 2.7(3) (e) of the handbook allows the Department to be represented by any person other than a legal practitioner. This means that it can select its representative from the entire civil service or adult population of the Republic of South Africa. The pool includes senior managers, labour law practitioners who are not legal practitioners and academics. The third respondent's decision implies that from this pool of people he could identify no one with the necessary ability to represent the Department competently. This decision falls outside the bounds of reasonableness. It illustrates that the third respondent did not apply his mind.

⁵ (2007) 28 ILJ 2405 (CC).

[20] In reaching his decision to allow legal representation the third respondent accepted that the cost of legal representation is felt more acutely by an individual as opposed to a government department. He, however, concluded that it is regrettably not the kind of prejudice which he could take into account. What is regrettable is the third respondent's unreasonable refusal to deal with the prejudice caused by the inability to pay legal costs. There is no value in extending the right to legal representation to a person who cannot afford to pay legal costs. The third respondent unreasonably disregarded the reasons furnished by the applicant for preferring to incur legal costs at the arbitration stage and trivialised the effects of having a disciplinary record. The third respondent's failure to apply his mind to this important part of the application before him rendered his finding susceptible to review. For these reasons the third respondent's ruling stands to be reviewed and set aside.

[21] I could find no reasons both in law and fairness for costs not to follow the result.

Order

[22] In the premises, the following order is made

22.1 The application to strike out is granted.

22.2 The ruling of the third respondent dated 22 January 2013 allowing legal representation at the applicant's disciplinary enquiry is reviewed and set aside.

22.3 The matter is remitted to the Department of Provincial Planning and Treasury-Province of the Eastern Cape for the disciplinary enquiry to be conducted without legal representation.

22.4 The first and second respondents to pay the applicant's costs of this application jointly and severally one paying the other to be absolved.

Lallie, J

Judge of the labour Court

LABOUR COURT

APPEARANCES

For the Applicant: Mr Minnaar Niehaus of Minnaar Niehaus Attorneys

For the Respondents: Advocate Buchanan SC with Advocate Schultz

Instructed by: Smith Thabata Inc

LABOUR COURT