IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 18771/2003

DATE: 31/3/2005

NOT REPORTABLE

In the matter between:

STEPHANUS LODEWICKUS GREYVENSTEIN

APPLICANT

And

DIE KOMMISSARIS VAN DIE SUID-AFRIKAANSE INKOMSTE DIENS

RESPONDENT

JUDGMENT

WEBSTER J

This is an application for the review and setting aside, in terms of Rule 53 of the Uniform Rules of Court, of a decision by an official of the respondent to institute disciplinary proceedings against the applicant, together with ancillary relief.

It is common cause that the applicant had been in the employ of the respondent for 19½ years. At the time of the decision to institute disciplinary proceedings against him he was the acting branch manager of the respondent in its Nigel office.

The disciplinary proceedings were instituted pursuant to an inquiry into the refund of value added tax (VAT) refunds made by the respondent to a certain close corporation MICARAN BOERDERY BK ("Micaran") totalling R27 525 788.00 in which it had been established that the said refunds had been made under fraudulent circumstances and the applicant had authorised the said payments without first establishing the validity of the claims in accordance with certain procedures designed to ensure that, as branch manager, he formed an independent and informed judgment, as he was supposed to have done. The applicant was found guilty. The sanction imposed was his immediate dismissal. The decision and sanction were taken on appeal in accordance with domestic procedures: the finding against the applicant was upheld and the appeal dismissed.

The applicant's case is that there is a pending dispute between the respondent and Micaran regarding the validity of the refunds made to Micaran. He avers that before this dispute is resolved no disciplinary proceedings could have been instituted against him. He avers that a finding in favour of Micaran in the pending litigation between it and the respondent will have a direct impact on the disciplinary proceedings for the very basis of the finding against him will have been founded on erroneous facts. In essence, the argument is that the disciplinary proceedings were immature and consequently null and void.

The background to the entire saga is summarised below. Registered vendors are entitled to claim refunds from the respondent. Some of these refunds can run into large sums of money, as was the case with Micaran. Micaran was refunded the following amounts for the corresponding tax periods:

"08/01 R2 730 268.82

07/01 R2 741 587.43

06/01 R3 188 *526.70"*

From time to time the responsible officers of the respondent select a certain sum which is not disclosed to the members of staff. Once the VAT refund payable amounts to the selected figure or exceeds it payment can only be effected if the branch manager lifts what is termed a "code 1 stopper" thereby authorising the payment of the refund. It is the respondent's case that the lifting of the code 1 stopper requires an informed and independent judgment by the branch manager upon a proper evaluation and consideration as to whether such refunds were in fact due. It is averred that the applicant, well aware that the VAT refunds were in respect of a "high risk" commodity *viz.*, tobacco, failed to apply his mind and authorised payments which he ought to have so authorised.

Mr. Barnard who appeared for the applicants submitted that (i) the decision to institute disciplinary proceedings constitutes an administrative act and is consequently reviewable (Despatch High School v Head, Department of Education Eastern Cape and Others 2003(1) SA 246 CK); (ii) the effect of the order sought is to set

aside the disciplinary proceedings; (iii) the evidence adduced at the disciplinary proceedings was not available to the official who took the decision that such proceedings be instituted against the applicant; (iv) there is no evidence regarding the nature, content and extent that was available to the official of the respondent who took the decision that disciplinary proceedings be instituted against the applicant; (v) the person who took the decision must have been aware of the fact that the proceedings to determine whether Micaran was entitled to the VAT refund were still pending alternatively that such official should reasonably have been aware of such fact.

It was submitted that the identity of the official who took the decision was not disclosed in the respondent's answering affidavit. It was submitted that the record filed (being pages 108 to 153 of the papers) related to the charges and the disciplinary hearing and further that the facts on which the decision was taken to institute the disciplinary proceedings were shrouded in secrecy.

Mr. Barnard further submitted that if the evidence adduced at the disciplinary hearing is accepted, there exists a dispute between the parties on the issue of the lawfulness of the refund of the VAT to Micaran and consequently that the issue should be referred to oral evidence.

Mr. Pretorius (S.C.), who appeared for the respondent submitted that (a) the decisions sought to be reviewed do not

constitute administrative action in terms of the Promotion of Administrative Justice Act (Act 3 of 2000) [PAJA]; (b) in the alternative, that even if the decisions are found to constitute administrative action, the application could not be entertained having been brought outside PAJA's prescribed time limit and without any application for condonation; (c) in the further alternative, that the respondent's decision to institute disciplinary proceedings against the applicant cannot, as a matter of "pure common sense", constitute administrative action capable of judicial review; (d) the decisions sought to be reviewed are in any event lawful, rational and procedurally fair and cannot be vitiated on any basis.

WAS THE DECISION AN ADMINISTRATIVE ACT?

In pressing upon me the argument that the decision to institute the disciplinary proceedings was an administrative act, Mr. Barnard relied heavily, if not exclusively, on the decision of Despatch High School v Head, Department of Education Eastern Cape and Others 2003(1) SA 246 CK (supra). In determining whether a decision to institute disciplinary proceedings constituted an administrative act or not, Ebrahim J, followed the findings in President of the Republic of South Africa v South African Rugby Football Union 2000(1) SA 1 (CC) (1999(10) BCLR 1059) in paragraph [141] and Transnet Ltd v Goodman Borthers (Pty) Ltd 2001(1) SA 853 at 855 B - G (paragraph (34) where it was held that *"in addition to an organ of State, administrative action could also be taken by a natural or juristic person when 'exercising a*

public power or performing a public function in terms of an empowering provision"".

Mr. Pretorius submitted that the decision to institute disciplinary action *in casu* was not a "public function" and consequently not administrative action. He relied in this regard on the definition of administrative action and the fact that in taking the decision the respondent was not carrying out an act based on the provisions of legislation. In articulating the first of these points he submitted that the basis of judicial review of administrative action is now the Constitution of the Republic of South Africa Act 108 of 1996 and PAJA. In this regard he relied on two decisions, *viz.*, Pharmaceutical Manufacturers Association of SA and Another: in re Ex Parte: President of the Republic of South Africa and Others 2000(2) 674 (CC) at paragraphs 33 and 44 and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004(7) BCLR 687 (CC). In the Pharmaceutical case Chaskalson P (as he then was) held that:

"33 .... *The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."*

"44. I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same

subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".

In the Bato Star case (supra). O'Regan J held at paragraph 22:

"The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. .. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter."

Moreover-

"... The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.

Mr. Pretorius submitted further that PAJA applies only to administrative action as defined and that anything outside that

boundary is not justiciable under PAJA. He conceded that the respondent was an *"organ of State within the definition of section 239 of the Constitution".* He submitted, however, that only decisions taken by organs of State which amount to the exercise of a public power or the performance of a public function constitute administrative action. He submitted that in taking the decision to institute disciplinary action against the applicant the respondent was not performance of a public duty or the implementing of legislation but simply an act by an employer against an employee in the capacities as master and servant. Mr. Pretorius distinguished the case *in casu* from Administrator Transvaal v Zenzile 1991(1) SA 21 (A) and the judgments which followed it and submitted that these judgements cannot be relied upon to review the decision at hand. He submitted that Despatch High School v Head, Department of Education Eastern Cape and Others (supra) had been wrongly decided. PAJA defines administrative action as follows:

"Administrative Action *means any decision taken or any failure to take a decision by-*

(a) an organ of State, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision which

adversely affects the rights of any person and which has a direct external legal effect, but does not include a court or a judicial officer".

PAJA defines "organ of State" as bearing the meaning assigned to the term in section 239 of the Constitution.

It is patently clear that the public nature of the power or function being performed is a defined requirement for administrative action in terms of PAJA but it has been held to be the single most important consideration in determining whether or not a decision constitutes administrative action. In President of the Republic of South Africa v South African Rugby Football Union 2000(1) SA 1 (CC) page 67, at paragraph 141 the Court ruled as follows:

"In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising. "

In Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001(3) SCA page 1023 [paragraph 16] Streicher JA held that [section 33 of the Constitution] " ... *is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public administration when it exercises public power ... [17] Whether or not conduct is 'administrative action' would depend on the nature of the power being exercised. Other considerations which may be relevant are the source of the power, the subject-matter whether it involves the exercise of a public duty and how closely related it is to the implementation".* It is clear upon a reading of subsections (1) and (2) (of section 33) that it is where a person's right or interests have been adversely affected or threatened by administrative action that a right to be heard will arise.

In finding whether the cancellation by the Cape Metropolitan Council, an organ of State, of a contract it had concluded with a private body constituted administrative action, the court held at page 1023 to 1024 [paragraph 18]:

"iThe appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking.

The appellant when it concluded the contract was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution, When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power."

Mr. Pretorius rightly conceded that the respondent is an organ of State. This is expressly so as section 2 of the South African Revenue Service Act 34 of 1997 (the Act) provides expressly so. It reads-

"ESTABLISHMENT. *The South African Revenue Service is hereby established as an organ of State within the public administration, but as an institution outside the public service."*

Section 18 reads as follows:

"(1) SARS employees, other than employees contemplated in subsection are employed subject to terms and conditions of employment determined by SARS.

(2) (a) The terms and conditions of employment of employees contemplated in subsection (1) *who are subject to any collective bargaining process in the SARS bargaining unit,*

must be determined after collective bargaining between SARS and the recognised trade unions has taken place.

(b) The collective bargaining referred to in paragraph must be conducted in accordance with the procedures agreed on between SARS and the recognised trade unions.

(3) The Minister must approve the terms and conditions of employment for any class of employees in the management structure of SARS.

(4) The Commissioner must submit a copy of the terms and conditions of employment determined by SARS in terms of subsection (1) *to the Minister."*

The provisions of section 18 are clearly intended to define and prescribe the terms and conditions of employment between SARS and its employees. The concept of a "collective bargaining agreement" between an employer and employees is one of the basic and fundamental practices regulating labour relationships in the open labour market. This section must be read together with the provisions of section (2) quoted above. Read in tandem these sections place the respondent outside the Public Service Act. Consequently the labour relationship between the respondent and its employees is not regulated by any other legislation - save the protection afforded by the constitutional era labour legislation which falls outside the scope of 'administrative action'.

The issues raised above were referred to in Public Servants Association on behalf of Hascke v MEC for Agriculture and Others (2004) 25 ILJ 1750 (LC) where Pillay J held at paragraph 16- *"Labour law is not administrative law. They may share common characteristics. However administrative law falls exclusively within the category of public law, whereas labour law has elements of administrative law, procedural law, private law and commercial law. Historically, recourse has been had to administrative law in order to advance labour rights where labour laws are inadequate."* Pillay J referred in this regard to the line of cases following upon the decision in Administrator Transvaal v Zenzile 1991(1) SA 21 (A). She ruled as follows at paragraph 12- *"... pursuant to the affirmation of the interim Constitution and the final constitution that everyone has the right to fair labour practices, the LRA (Labour Relations Act), the EEA. (Employment Equity Act) and the Basic Conditions of Employment Act 75 of 1997 (the BCEF) codified labour law and employment rights. Adjustments were also made to other national laws, such as the Public Service Act (Proc 103 of 1994), the Police Services Act 68 of 1995 and the Employment of Educators Act 76 of 1998, to bring them in line with the Constitution."*

Upon a conspectus of the cases referred to above and the historical rationale for recourse to administrative law prior to the constitutional era or labour legislation, I incline to the conclusion that the Despatch High School case (supra) was incorrectly decided. This is so as the act of instituting disciplinary

proceedings could not in my view be said to constitute the exercise of a public power or the performance of a public function. I elect not to follow it.

Should I have erred in the reasoning set out above it is my considered view on a plain logical approach that the decision to institute disciplinary proceedings *in casu* cannot constitute administrative action. To find that it did would postulate the following hypothesis:

1. *"A decision to institute disciplinary proceedings would demand the full spectrum of procedural fairness requirements that are attracted by administrative action.*
2. *Audi alteram partem would entitle the impugned employee to be heard on whether or not disciplinary action should be instituted against him or her.*
3. *This would amount to the convening of a hearing in order to determine whether to convene a hearing.*
4. *The natural justice principle of nemo index sua causa (incorporated within PAJA) would demand that such a hearing be convened and determined by a person other than the person seeking to institute the disciplinary proceedings against the impugned employee'.*
5. The impugned employee would justly raise the *audi alteram partem* objection against the decision in (1) supra.

I am of the considered view that the applicant has failed to prove that the respondent's decision to institute disciplinary proceedings does constitute administrative action.

In the alternative to the issue dealt with above the respondent submits that in terms of the provisions of PAJA the application was brought out of time and in the absence of a substantive application this application should fail. A short chronology of events in this matter is set out below.

(i) PAJA commenced on 30 November 2000.

(ii) The applicant's appeal was finalised on 25 October 2002.

(iii) The applicant launched this review application on 4 July 2003 i.e. 252 days after the appeal was finalised.

It is a well-established rule that an application for the review of administrative action must be brought within a reasonable time (Wolgroeiers Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommisie en 'n Ander 1986(2) SA 57 (A).

Section 7(1) of PAJA provides as follows-

"7. ***Procedure for judicial*** *review.-(1) Any proceedings for judicial review in terms of section* 6(1) *must be instituted without unreasonable delay and not later than 180 days after the date-*

(a) subject to subsection (2)*(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection* (2)*(a) have been concluded; or*

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. "

Section 9(1)(b) of PAJA allows for the extension of the 180 day time limit for the institution of review proceedings. Such an extension must be sought by agreement between the parties and in the event of failure to secure such extension as aforesaid; may the applicant approach a court for the extension. Section 9(2) of PAJA provides that a court may grant such an extension where the interests of justice so require.

The respondent pertinently raised the issues in the preceding paragraph in the answering affidavit (Page 178, paragraph 21.1). The applicant 'declined the invitation', albeit at a late stage, to avail himself of the provisions of section 9(1)(b) of PAJA. His reply is interesting. It reads: *"Ek word geadviseer dat die deponent se poging om op hierdie wyse 'n regspunt te fundeer abortief en misplaas is. Die feite wat die gronde vir my hersieningsaansoek ingevo/ge Reël* 53 *van die Hooggeregshof Reëls fundeer het op 'n later stadium tot my kennis gekom. Daar is geen benadeling vir die Respondent nie en die deponent poog ook nie, met respek tereg so, om 'n saak van benadeling uit te maak nie. Verdere regsargumente sa!, indien nodig, aan die Agbare Hof voorgehou word in die verband."*

(Page 207, paragraph 15)
The applicant did not deem it meet to disclose what the "facts upon which the applicant relies for his review" were or when they came to his knowledge. Accordingly, the applicant has failed to set out clearly and concisely where the interests of justice lie.

In the light of the above finding it is not necessary to consider the applicant's grounds of review. Had it been necessary to do so my considered view is that the applicant's grounds of review are without legal basis as the facts clearly proved that the applicant was guilty of gross dereliction of his duties. I have considered the finding of the presiding officer in the disciplinary hearing as well as the detailed judgment on appeal and I can find no irregularity, misdirection or the reason to delay the holding of the disciplinary inquiry (Davis v Tip 1996(1) SA 1152 W; Seapoint Computer Bureau v McLoughlin & De Wet 1997(2) SA 636 (W); NDPP v Prophet 2003(6) SA 154 (C)). There was no legal duty on the respondent to defer the disciplinary process pending the finalisation of any criminal or civil proceedings: *"refunds totalling over R10 million were approved by the employee (the applicant) in all twelve instances without the employee raising a single query".* The application has to fail.

Mr. Pretorius submitted that the costs order for research and drafting of the respondent's head of argument should be allowed in respect of two counsel. Mr. Barnard did not oppose this. The

request is justified in the light of its nature, importance to the parties and complexity.

The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

G. WEBSTER

JUDGE IN THE HIGH COURT

Date of hearing	11 February 2005
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