In the High Court of South Africa

[Transvaal Provincial Division]

NOT REPORTABLE

Case no A 937/04
DATE: 4/4/2005

In the matter between

Patrice Motsepe — 1st Appellant

The Federal Council of the National African Federated Chamber of Commerce & Industry — 2nd Appellant

and

Vincent Phaala — Respondent

Judgment

Daniels J

I shall firstly set out the common cause facts that gave rise to the application which was launched by the respondent as they applied at the time when Ledwaba AJ considered the matter.

The respondent was the deputy-president of the first appellant. He claimed to have been elected as the president of Nafcoc in the Limpopo province during elections which were held in June 2003. The first appellant, however, took the view that the elections were invalid in as much as they were conducted in defiance of a Nafcoc resolution of November 2002 and written instructions issued by the chairman of Nafcoc's election committee not to proceed with those elections.

It was then resolved to institute a disciplinary enquiry against the respondent. He was advised of this fact on 23 June 2003. In this notice the respondent was -

- advised of the time, date and place of the proposed hearing;
- informed of the facts relating to the disciplinary charge that he brought Nafcoc into disrepute, with sufficient clarity to enable the respondent to understand the case he had to meet;
- informed of his rights in the conduct of his case:

  he was thus informed of his right to be represented at the hearing by a fellow member of Nafcoc, to question witnesses, and to put his version and to make submissions relevant to his defence.

The matter was not proceeded with on that date for reasons that do not concern us.

On 9 July 2003 the respondent was notified that the enquiry was scheduled for 15 and 16 July 2003. The notice contained a description of two complaints which were to be investigated. The first was a repeat of the complaint referred to in the earlier notice, and the second was related to the issuing of false, inaccurate and misleading media statements by the respondent.

In both the notices the nature of the disciplinary charges and the material facts upon which they were founded, were described with sufficient detail. In both instances the respondent was informed of his right of representation in the conduct of his defence.

The dates for the hearing were determined without prior consultation with the respondent. At that stage the respondent was not represented by an attorney. On 14 July 2003 the respondent's attorney came on record. This was one day before the scheduled commencement of the proceedings on 15 July 2003. The attorneys did not raise any objections to the predetermined dates, and did not at that stage seek a postponement. They indicated that they would have been in a position to proceed if it had not been for the additional charge that was added to the charge sheet. This necessitated the obtaining of instructions from their client and rendering them unable to proceed.

On the same day the respondent's attorney addressed a further letter to the appellant's attorney wherein he indicated that they were making every effort to be ready for the hearing 'from a legal point of view' whatever that might have

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meant. What the attorney needed according to this letter was ' ... a consultation with client on certain strategic matters of the hearing.'

The appellants agreed to a postponement. On 17 July 2003 the appellant's attorney advised the respondent that the proceedings were to be postponed to 19 and 20 August 2003. At the same time the respondent was requested to produce a copy of the medical certificate which his attorney had undertaken to furnish. On the very next day the appellant's attorney advised the respondent's attorney that the dates, 19 and 20 August 2003, being the dates to which the hearing was to have been postponed, were communicated to them in error, and that the hearing would in fact continue on 24 and 25 July 2003. On 22 July 2003, two days before the rescheduled commencement, the respondent's attorney advised the appellants' attorney that 24 and 25 July 2003 did not suit him or his client. The attorney explained that he was *'heavily engaged'* on the suggested dates, and that the dates did not suit his client.

On the next day the appellants' attorney informed the respondent's attorney that his client was agreeable to have the matter postponed to 30 and 31 July 2003. In so advising the respondent's attorneys, they also informed them that-

> 'In the event that you are not available to render assistance to your client at this time, we suggest that your client seek alternative assistance. Subject to the right of the disciplinary committee to decide for itself on any application which your client may in due course bring,

> we have been instructed not to consent to any further postponement of the hearing. Our client has been prejudiced by the repeated postponements. '

The respondent's attorney apparently took the set down of 30 and 31 July as an error, probably because that date was determined by the appellants without establishing his own availability or that of his client. On 24 July 2003 he responded in the following fashion -

> 'The unavailability of a legal representative for representing a client at a particular tribunal can never be a reason for such lawyer's services to be deprived of that particular client. Writer hereof has seen many instances where dates have been set by all courts where he had represented his client to suit his availability. Writer hereof cannot see why Nafcoc cannot set a date which suits his availability.'
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> He concluded by adding -
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> 'Once the dates of the hearing are set and agreed upon as well as confirmed we will then deal with the nitty-gritties and the preliminary issues and objections that our client might have pertaining to the structure, procedure and format of the hearing.'

In this letter the attorney explained that his client (the respondent) was a businessman with a busy schedule, and that he had several national and international engagements *' .... which are more in line with the dates of the 18th and the 19th of August',* Here I should add that it was subsequently pointed out by the appellants' attorney that '*vague and unsubstantiated allegations'* (such as those referred to) '... *do not provide justification for the postponement of the*

hearing.' In his founding affidavit the respondent failed to explain his unavailability. He simply referred to the letters without providing proof of the alleged national and international commitments previously alluded to. Since the attorneys were instructed not to consent to a postponement, they invited the respondent and his attorney to appear before the disciplinary committee to motivate their request for a postponement. It was after all the prerogative of the Disciplinary Committee to decide whether sufficient cause had been shown which would have entitled the respondent to a postponement.

When the hearing commenced on 30 July 2003 neither the respondent nor his attorney was present. The hearing was adjourned for almost an hour during which time attempts were made to establish contact with the respondent or his attorney. The committee was unable to do so and the question then arose whether the proceedings should continue in the absence of the respondent and his representative. It was decided to proceed. In so deciding the committee considered the fact that the respondent had been invited to make representations to it in support of his application for a postponement, that the unavailability of the respondent's representative in itself was insufficient reason for postponing the hearing, that Nafcoc was prejudiced by the delays and that the committee was required only to make factual findings and recommendations to the Federal Council which was obliged in any event to afford the respondent a further opportunity to make

representations to it before a final decision would be taken. Given those circumstances the committee was of the view that no harm would be done by proceeding with the hearing in the absence of the respondent.

I should explain that it was common cause that the *ad hoc* disciplinary committee was mandated only to receive evidence and to submit a report wherein its findings and recommendations were to have been recorded. In terms of Nafcoc's constitution to which the respondent subscribed and which was binding on all the parties here involved, it was the Federal Council that had to consider the report and recommendations and to finally decide the matter. It was known that the respondent was entitled to attend the meeting of the Federal Council, there to make such representations as he deemed necessary. He also had the right to be represented at that 'hearing'. In any event the committee then received evidence on the merits of the charges and made findings of fact and concluded that the respondent was guilty of conduct that brought Nafcoc into disrepute. It recommended that the respondent's membership be terminated or suspended and that he should accordingly cease to hold office as the deputy - president of Nafcoc.

It is this recommendation that the respondent sought to have set aside. Ledwaba AJ found on the facts that the procedure was irregular and that the respondent was not afforded a fair hearing, and granted the relief prayed.

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It is that finding which is the subject matter of this appeal, the crisp issue to be decided being whether the respondent was afforded a proper and or fair trial.

I shall firstly state what I perceive to be the legal principles to be applied. Appellant's counsel submitted firstly that the proceedings could not have been held unfair on the ground only that the dates did not suit the respondent. It was submitted that other factors have a bearing on the question whether the proceedings were fair and in support thereof relied upon the judgment in *Chairman Board or Tariffs and Trade v Brenco Inc 2001* 4 SA 511 (SCA) at 521E-F.

I quote from the head note -

> 'there was no single set of principles for giving effect to the rules of natural justice which would apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, Courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts. In the application of the concept of fair play there had to be real flexibility, so that very different situations might be met without producing procedures unsuitable to the object in hand. It was only too easy to frame a precise set of rules which might appear impeccable on paper and which might yet unduly hamper, lengthen and indeed perhaps even frustrate the activities of those engaged in investigating or otherwise dealing with matters that fell within their proper sphere. In each case regard had to be had to the scope of the proceeding, the source of its jurisdiction, the way in which it normally fell to be conducted, and its objective.

I fully agree with and endorse the judgment.

The need for flexibility in considering the fairness or otherwise of administrative action was again spoken of in the case of *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2002 (5) SA 449 (SCA) 455,456H - 457B/C, 457B/C - C/D and 457F/G - 458C where the right to legal representation was discussed and where it was held that - (I again quote from the head note)

> ' ... where a hearing took place before a tribunal other than a court of law, there was no general right to legal representation. Where the relationship between the parties was governed by contract, the right of the person being subjected to an enquiry arising out of that contract to be legally represented at such enquiry had to depend on the terms of the contract itself. South African law does not recognise an absolute right to legal representation in fora other than courts of law. It is significant that, while the Bill of Rights in the Constitution of the Republic of South Africa Act 108 of 1996 in s 35 expressly spells out the right 'to choose, and to consult with, a legal practitioner' and 'to choose, and be represented by, a legal practitioner', it does so only in the context of an arrest for allegedly committing an offence and in the context of the right to a fair trial which 'every accused person' has. There is no comparable recognition or bestowal of such a right in relation to 'administrative action' in s 33 or item 23(2) of Schedule 6. There is a similar omission to accord or to recognise such a right in the Promotion of Administrative Justice Act 3 of 2000.
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> While there has always been a marked and understandable reluctance on the part of both legislators and the Courts to embrace the proposition that the right to legal representation of one's choice is

> always a *sine qua non* of procedurally fair administrative proceedings, it is also true that there has been growing acceptance of the view that there will be cases where legal representation may be essential to procedurally fair administrative proceedings, including, inter alia, quasi-judicial proceedings. In short, there is no discernible constitutional imperative regarding legal representation in administrative proceedings, other than recognition of the need for flexibility to allow for legal representation, but, even then, only in cases where it is truly required in order to attain procedural fairness.'

It would accordingly be correct to say that the lack of provision for legal representation, or the failure to provide or allow legal representation in administrative proceedings such as those here under consideration, will not, in itself, render the proceedings unfair or irregular. Again one cannot be dogmatic. One has to be flexible and one's approach has to be adapted where the circumstances (such as the gravity of the offence or the complexity thereof) require relaxation to attain procedural fairness.

In the matter here under consideration a special disciplinary committee was constituted because of the respondent's seniority and the publicity generated by the decision to proceed against him. It was a serious matter at least as far as the respondent was concerned, and probably from his point of view not entirely uncomplicated. It warranted legal representation. That much the appellants clearly conceded. Once that concession was made the appellants

were obliged, within limits, to accommodate the respondent and his representative. At the same time the unavailability of a legal representative cannot without more be a good ground to obtain a postponement of the proceedings. In the matter of *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC) 321A - C/D counsel for the appellant applied for a postponement. The application was refused by the commissioner, and the matter stood down till the next day. Two further applications for postponement were also refused, as a result of which the appellant's attorney and chief executive officer withdrew from the proceedings. All the postponements were sought on the ground that the attorney who had originally handled the case had suffered a personal tragedy and had been unable to deal with it. The applications were refused on the grounds that there had been no explanation of the steps taken to obtain alternative legal representation; that preparation for the hearing could have commenced earlier; and because the prejudice resulting from a postponement was incapable of being cured by an order for costs. The hearing continued in the appellant's absence and concluded with compensation being awarded to the respondent employees. The appellant's application in the Labour Court for the review of the first respondent's refusal to grant the applications for postponement was refused. The appellant appealed to the Labour Appeal Court. In dismissing the appeal the court held that -

> ' ... there had been sufficient material before the commissioner for him to have concluded rationally and objectively that the reasons given by the appellant were not sufficient to merit the granting of the application for postponement. He had weighed up the prejudice that would follow for the appellant from a refusal against the prejudice the employees would suffer if a postponement were granted and had taken notice of the absence of a solution to this predicament on the basis of a costs order. The reasoning was rationally connected to the material before him and his decision and the reasons given for it did not support an inference of misconduct, irregularity or impropriety.'

I am satisfied also that the appellants are correct where the submission is made that an affected person such as the respondent, is not necessarily entitled to be heard, but that it is sufficient if he or she is given a reasonable opportunity to make representations. What a 'reasonable opportunity' really is again depends upon the facts of each particular case.

Counsel for the appellants argued that the court *a quo* erred in adopting a rather limited approach in relying solely on the claim that the dates on which the proceedings were conducted were not suitable to the respondent and his attorney. In so limiting its vision the trial court failed to measure that claim in the context of all the relevant facts which were placed before it, and failed to measure that claim against the weight of the other relevant considerations.

Even if one accepts that the trial court adopted this limited approach, I would suggest that it does not follow that the appeal should succeed on that basis alone. One has to consider the surrounding circumstances, and in any given

situation it may turn out to be the only and indeed the overriding or paramount consideration.

In view of the approach I intend adopting and the decision that I have reached, it will not be prudent to express my views regarding the fairness or otherwise of the manner in which the matter was dealt with by the various parties.

As had been indicated previously the decision taken by the Disciplinary Committee, however arrived at, was always subject to confirmation and endorsement by the Federal Council. Briefly stated it was not a final judgment. The respondent was in terms of the first appellant's Constitution always entitled to address the Council and to make such representations as he deemed advisable. At the hearing in the Court *a quo* the appellants argued that the application was premature. Ledwaba AJ rejected that argument. The correctness of that finding was raised as one of the grounds of appeal, the suggestion being that the finding was incorrect.

This point was again raised before us. The point was made that the application was premature in that the respondent had not at that stage exhausted all the remedies at his disposal. Accordingly, so the argument went, he failed to show that he suffered any prejudice as a result of the Committee's decision to proceed in his absence and in the absence of his attorney.

In response to this argument mr Arnoldi who appeared for the respondent submitted that his client in fact suffered a grave injustice and was indeed prejudiced in that he did not have an opportunity to cross-examine the witnesses and could not put his version. He was deprived of the right to present his own evidence in rebuttal, and he was deprived of the right to make submissions in support of his case. In this regard mr Arnoldi relied upon the judgment in *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A) 646 where it was held that -

> 'The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any preiudicial statement or allegation made against him *(Marlin's case, supra* at p. 126; *Bekker v Western Province Sports Club (Inc.)* 1972 (3) SA 803 (C) at p. 811). The tribunal is required to listen fairlv to both sides and to observe lithe principles of fair plav" *(Marlin'scase, supra* at pp. 126 and 128). In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially *(Dabner v SA Railways and Harbours* 1920 AD 583 at p. 589). They require also that the tribunal's finding of the facts on which its decision is to be based shall be "fair and *bona fide" (Jockey Club of S.A. v Transvaal Racing Club,* supra at p. 450). It is, in other words, "under an obligation to act honestly and in good faith *(Maclean v Workers' Union, supra* at p. 623)'

(emphasis added)

Ultimately the Federal Council would have been presented with a one-sided, probably unbalanced, account and in those circumstances according to counsel, he was severely handicapped and certainly prejudiced. The import of these submissions was that belatedly made representations would not have, as a probability, been successful, and that it was cold comfort to be told that he was entitled to make representations to the Federal Council, this after the proverbial horse had bolted.

I should point out that it was never the respondent's case in the Court *a quo* that the Federal Council would be biassed in considering the recommendations and findings of the Disciplinary Committee. At best, and at the risk of being generous to the respondent, his case was that the Council would be confronted with a one-sided report and recommendations based upon untested evidence. In the case of *Onshelf Trading Nine (Pty) Ltd v De K/erk NO and Others* 1997 3 SA 103 111-113 (W) Streicher J (as he then was) held in a not dissimilar context that -

> ' ..... it may be that this Court also has jurisdiction to take the decision in the first instance where it is obvious that, because of bias on the part of the tribunal, it would serve no purpose to apply to the tribunal first merely to have the tribunal's decision subsequently set aside and to substitute the Court's decision for the decision of the tribunal. ..... Moreover, even if the council is biassed, it cannot be contended that a decision by the council will serve no purpose. Once a Court has

> been furnished with the reasons of the council it will be in a better position to substitute its own decision for that of the council if the council's decision is found to be invalid because of bias and the circumstances are such that the Court may substitute its decision for that of the council.'

Bias, apparent or real, would accordingly not suffice to by-pass the Federal Council. Compelling authority for the proposition that a final decision must generally have been taken before the courts will involve themselves with a matter is to be found in the judgment of Trollip J in *Tikley and Others v Johannes NO and Others* 1963 2 SA 588 (T) 589-590 where it was held that a court would generally not interfere at an 'interlocutory' stage since -

> ' .... the final decision might correct the irregularity in the proceedings complained of, or might cure any prejudice that the aggrieved person has thereby sustained. But .. this Court is entitled to intervene at any stage to correct the pending proceedings before the inferior tribunal if, in the particular circumstances, that is necessary or convenient for the purpose of doing justice between the parties.'

In *Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another 1959* 3 SA 113 (A) it was held that a court has the power to interfere with the unterminated course of proceedings in a court below in rare cases where grave injustice might otherwise result or where justice might not by other means be obtained. In general, however, the court held that it would hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress

by means of review or appeal would ordinarily be available. (See also *Van Wyk v Midrand Town Council and Others* 1991 4 SA 185 (W) and *Nell v Raad van Eiendomsagente* 1986 4 SA 605 610B-D.)

It was not the respondent's case that a 'grave injustice might otherwise result' or that 'justice might not by other means be obtained,' nor was it suggested that 'redress by means of review or appeal' was not available to him. The respondent failed to make out a case for the relief claimed. The court *a quo* ought to have found that the application was premature in as much as the internal remedies had not been exhausted.

The fact that the notice calling upon the respondent to attend the meeting of the Federal Council was inadequate or irregular (as to which see paragraph 25.5 of the founding affidavit) did not warrant the granting of the order. Had the Federal Council proceeded with the enquiry despite the short notice and in the respondent's absence, it would have constituted an irregularity that would have rendered the proceedings irregular and subject to review. Counsel agreed that the successful party should be awarded the costs of the Application for Leave to Appeal.

The following order is made -

1 The appeal is upheld with costs, including the costs of two counsel, and including the costs of the Application for Leave to Appeal.

2 The order of the Court *a quo* is set aside and substituted with the following -

'The application is dismissed with costs, including the costs of two counsel',

H Daniels
Judge of the High Court

I agree

F G PRELLER
Judge of the High Court

I agree

W SERITI
Judge of the High Court