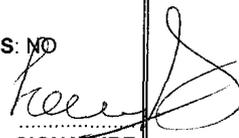


IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. 60444/2012

7/12/2012

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
7/12/12
DATE

SIGNATURE

In the matter of:-

ALETTA MOIPONE MOSIDI

Applicant

and

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Applicant

**DIRECTOR-GENERAL : DEPARTMENT OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

First Respondent
Second Respondent

JUDGMENT

Van der Byl AJ:-

[1] The Applicant, an attorney of this Court holding the position of State Attorney in Pretoria, is presently suspended from duty pending the finalization of disciplinary

proceedings instituted against her by her employer, the Department of Justice and Constitutional Development.

[2] In the pending disciplinary proceedings she is faced with 10 charges which all emanate from the execution of her duties as State Attorney and which appear, on the face of it, to be of a serious nature.

[3] The disciplinary proceedings were scheduled for hearing on 12 June 2012, but was, because of an administrative error in the notice in which it was scheduled, on 12 June 2012 rescheduled for hearing on 12 July 2012. On this occasion the Applicant was granted permission by the chairperson to be represented by a legal representative of her own choice, whereafter the matter was postponed to 22 October 2012 as the employer intended to submit an amended chargesheet.

[4] After the amended chargesheet was made available to the Applicant she on 31 August 2012, through her attorney of record, addressed a request to the Second Respondent, the Director-General : Justice and Constitutional Development, for "*financial assistance for her legal fees*" on the grounds thereof -

- (a) that she, as an individual, is unable to fund her legal representation;
- (b) that she is in any event entitled to the same representation as her employer, consisting of a senior practitioner and an assistant, senior and junior counsel and various senior officials from the Department.

.../...

[5] As is apparent from a letter dated 11 September 2012 the Applicant was informed by the attorney of record of the Respondents that her request was refused and that the disciplinary proceedings will go ahead on 22 October 2012.

[6] A request, as is apparent from a letter dated 11 October 2012, for reasons for the decision to refuse the Applicant financial assistance was also refused, primarily, because the Respondents were of the view that the decision "*is not of an administrative nature*" and that, apart from an alleged unfair advantage, no basis has been advanced upon which she is entitled to such assistance.

[7] The Applicant, thereupon, launched this application on 18 October 2012 claiming, in addition to the usual order of costs -

- (a) an order reviewing and setting aside the Second Respondent's decision refusing "*to provide the Applicant with financial assistance to fund her legal costs occurred in the disciplinary proceedings*";
- (b) an order in terms of which the one or the other of the Respondents is ordered to pay to the Applicant the amount necessary to provide for the reasonable expenses to be incurred by her legal representatives, including senior counsel, for the preparation of and conducting of the disciplinary proceedings instituted against her, **alternatively**, an order in terms of which the matter is referred back to the First or Second Respondent for reconsideration of the request for financial assistance;

...

- (c) an order compelling the one or the other of the Respondents to authorize and approve the appointment of an attorney and counsel to act on her behalf in the disciplinary proceedings.

[8] On 22 October 2012 the disciplinary proceedings were postponed to 19 November 2012, but did not proceed on that date in consequence of a court order granted by Pretorius J on 20 November 2012 interdicting the Respondents from proceeding with the disciplinary proceedings until such time as this application has been finally adjudicated upon.

[9] Various contentions are raised in the papers and submissions made in this Court on the question whether or not -

- (a) the Applicant can indeed afford legal representation;
- (b) the decision of the Second Respondent constitutes "*administrative action*" as defined in section 1 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), and, if so, the Second Respondent acted procedurally unfair, in bad faith or arbitrarily or capriciously or, for not having furnished reasons, improperly in contravention of section 5 of that Act or is so unreasonable that no reasonable person could have so exercised such a discretion.

[10] In my view the real issue in this matter lies, as a matter of law, in the one or the other of two questions, namely -

.../...

- (a) whether the Applicant, as an employee, is in law entitled to legal representation in disciplinary proceedings;
- (b) if so, is there any legal principle by virtue of which an employee can be ordered to pay, wholly or partially, for the legal representation obtained by an employee to act on his or her behalf in disciplinary proceedings instituted by the employer, or to obtain, and pay for, any such legal representation?

[11] In **Cuppan v Cape Display Supply Chain Services 1995 (4) SA 175 (D)** the learned Judge (Page J) held, on the question whether or not an employee has in law a right to legal representation, at **180G** as follows:

"It appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation; and where the relationship between the parties is 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 must depend upon the terms of the contract itself (See: Dabner v SA Railways & Harbours 1920 AD 583 at 598-9; Embling v Headmaster, St Andrews C College (Grahamstown) & another 1991 (4) SA 458 (E); (1991) 12 ILJ 277 (E); and, in particular, Lamprecht & another v McNeillie 1994 (3) SA 655 (A); (1994) 15 ILJ 998 (A)."

[12] It does not appear to be the contention that the Applicant has, as is also apparent, as indicated to me by counsel, from the disciplinary code applicable to officers in the employ of the State, a general right to legal representation by virtue of her conditions of employment or any other contractual right.

[13] This brings me to the real question to be decided in this matter, namely, whether

.../...

the Applicant is in law entitled to claim an order that the Respondents be ordered to provide financially for the Applicant's legal representation.

[14] I know of no authority (and my attention was not directed to any authority) in terms of which, as a general proposition, an employer is in law obliged to ensure that an employee charged in disciplinary proceedings is, at the expense of the employer, legally represented.

[15] Mr Cilliers SC who appeared on behalf of the Applicant, however, submitted -

(a) that I should consider granting an order, as a matter of fairness towards the Applicant, directing the Respondents to provide for the Applicant's legal representation, bearing in mind, particularly, that the Department has appointed a legal team to represent it at the disciplinary proceedings;

(b) that I, before delivering judgment, should consider requesting the Respondents to provide me with information as to the authority by virtue of which they appointed their own legal team.

[16] I find myself not in a position to adhere to any of these propositions.

[17] The Respondents' authorization to have appointed its own legal team was not challenged by the Applicant in the papers so that they were not called upon to deal in the papers with such authorization. Should it happen that they do not have such

.../...

authorization, the expenses incurred in respect of such appointment will in all probability constitute unauthorized expenses envisaged in the Public Finance Management Act, 1999 (Act 1 of 1999), which can be or should be dealt with under the provisions of that Act (see, eg., Chapter 10 of that Act dealing with financial misconduct). I am accordingly not inclined, as requested by Mr. Cilliers SC, to request the Respondents to provide me with information regarding their authorization to appoint legal representatives in disciplinary proceedings to act on their behalf.

[18] The fact that the Respondents indeed appointed their own legal team cannot be regarded as proof that the Respondents do have the authority to provide the Applicant with legal representation at State expense.

[19] As a matter of fact it is the Respondents' explicit contention that they are "*not authorised by any regulation to give financial assistance to the Applicant for the purposes requested*" (**record pp. 217, paras 9 and 10**).

[20] In terms of section 213 of the Constitution money may be withdrawn from the National Revenue Fund only in terms of an appropriation by an Act of Parliament or as a direct charge against the Fund when it is provided in the Constitution or in an Act of Parliament.

[21] I am accordingly unpersuaded that I can in the circumstances grant an order directing the Respondents to make some provision for any legal representation for the Applicant.

.../...

[22] This leaves me with two further issues to consider, namely -

- (a) to consider, as requested by Mr. Cilliers SC, granting an order directing the Respondents not to schedule the disciplinary proceedings for hearing until such time as the Applicant has been able to raise sufficient funds to pay for her legal representation; and
- (b) to consider whether or not an order of costs should be granted against the Applicant.

[23] As to the first of these issues, it is a matter that has not been properly canvassed on the papers, particularly, the failure of the Applicant to have provided sufficient information regarding her financial position. I can only express the hope that the Respondents will, if provided by the Applicant of the means at her disposal to provide for her legal representation, in all fairness to the Applicant, take such steps as are reasonably possible so as to afford her a reasonable opportunity to raise the necessary funds before the proceedings are scheduled for hearing.

[24] As to the question of costs, differing contentions were raised on behalf of the parties. On the one hand it was submitted by Mr. Pelsner SC who, together with Ms Matlejoane, appeared on behalf of the Respondents, that she made in her papers certain derogatory remarks in relation to the conduct of the Respondents. On the other hand Mr. Cilliers SC submitted that this application was triggered by the fact that the Respondents unnecessarily refused to provide her with reasons for their refusal to make

.../...

any provision for legal representation at State expense. Had they done so and indicated to her that there is no authorization for granting such a request, she would in all likelihood not have launched this application or could have challenged the Respondents' authorization to have appointed their legal team.

[25] I prefer to consider the question of costs on the principles enunciated in *Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) at 245C-247E, para [21] to [25]* in which the Constitutional Court, as in previous judgements in that Court, confirmed the general rule that in constitutional litigation an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.

[26] This rule is based on the rationale that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights. An exception is, however, acknowledged to this general rule where, for instance, if litigation is frivolous or vexatious or in any other way manifestly inappropriate.

[27] I am unpersuaded that the litigation in this matter frivolous or vexatious or in any other way manifestly inappropriate.

[28] In these circumstances I do not consider it to be in accordance with the dictates of justice to saddle the first respondent with the burden of paying the costs.

[29] In the result I make the following order:

.../...

1. THAT the application be dismissed.

2. THAT no order be made as to costs.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV J G CILLIERS SC

On the instructions of

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c/o PIET VAN ZYL ATTORNEYS
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Arcadia
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Ref: WW Coetzee/WD819
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ON BEHALF OF THE RESPONDENTS

ADV Q PELSER SC
ADV B MATLEJOANE

On the instructions of

MPOYANA LEDWABA INC
130 Main Street
Nieu Muckleneuk
PRETORIA
Ref: Mr Ledwaba/MM/MLM
(012) 346 4093/4348

DATE OF HEARING

5 DECEMBER 2012

JUDGMENT DELIVERED ON

7 DECEMBER 2012