IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN **Case Number: D511/99**

In the matter between

Police and Prisons Civil Rights Union Applicant

and

The Minister of Correctional Services 1st Respondent

The National Commissioner of Correctional Services 2nd Respondent

F Joseph NO 3rd Respondent

JUDGMENT

JALI AJ

1] This is an application which has brought before me on an urgent basis by the Police and Prisons Civil Rights Union ("the Applicant") against the Minister of Correctional Services ("the first Respondent"), The National Commissioner

of Correctional Services ("the second Respondent"), and F Joseph NO ("the third Respondent"). The Applicant filed its papers yesterday afternoon, the First and Second Respondents filed their answering affidavits at the commencement of the hearing. The matter had, to be stood down, on two occasions, to accommodate the Respondents who, firstly, did not have their counsel in court and, secondly, to give the Respondents' counsel an opportunity to consider the answering affidavits filed before the matter could proceed.

2] The Notice of Motion was in the form of an application for a rule *nisi*, seeking an order declaring the charge sheet of the Respondents invalid and unlawful, reviewing and setting aside the refusal to allow legal representation of the Applicant's members at the enquiry, ordering the Respondents to make statements available to the Applicant's members, ordering the Respondents to disclose the name of the chairperson of the disciplinary enquiry, and lastly praying that the Respondents be interdicted from proceeding with the disciplinary enquiry which was scheduled for 24 May 1999.

3] The order restraining the Respondents from proceeding with the disciplinary enquiry was to operate as an interim interdict with immediate effect pending finalisation of the Application.

Facts:

4] The background to this matter, briefly, is that on or about 19 February 1999, the first Respondent had launched an application for certain interdictory relief against 34 individual Respondents at the Natal Provincial Division of the High Court of South Africa under Case Number 616/99 ("the High Court Application"). During 1998, prior to the said High Court application, tension had escalated between workers and management at the various prisons in KwaZulu-Natal, which led to some protest action which resulted in the Respondents seeking the aforesaid interdict.

5] The Applicant is the majority union in the various prisons in KwaZulu-Natal which are under the jurisdiction of the first Respondent. The Applicant has moved this application on behalf of forty four (44) of its members ("the accused") who have been charged with misconduct by the first Respondent. There are twenty four (24) charges preferred against the accused. They cover a period from August 1998 to February 1999.

6] During April 1999 the Applicant's attorney of record was contacted by representatives of the first and second Respondents. They requested that the attorneys assist with the serving of certain charge sheets, in respect of internal disciplinary hearings, on the Respondents in the High Court proceedings. In response, the Applicant's attorney of record indicated that he would facilitate the service of the charge sheets on his clients, as against

accepting service on their behalf. This he accordingly did during the period 10 - 12 May 1999. Upon receiving the charge sheet, it transpired that the charges were not only the against the 34 individuals in the High Court application. Out of the 34 of the High Court Respondents only 32 were charged. In addition, there were others, accused numbers 33 - 44, who were not Respondents in the High Court Application. The Applicant's attorney of record, on behalf of the Respondents, facilitated the service of the charge sheets on 20 of the accused. According to the Applicant, their attorney did not receive charge sheets in respect of about 16 other accused.

7] All of the accused received a similar charge sheet with the same counts preferred against all of them.

8] On or about 12 May 1999 the Applicant's attorneys of record wrote to the first and third Respondents raising certain objections to the charge sheet, *inter alia*, the notice period given for the hearing, complaining about the vagueness of the charges, that there were certain accused against whom there were no charges or evidence, and the location of the hearing. In addition they also requested legal representation in the disciplinary enquiry and certain information.

9] On 12 May 1999 the Respondents advised the Applicant's attorneys that the disciplinary hearing which was originally scheduled for 3 May 1999 and later

postponed at the request of the Applicant to 17 May 1999 was no longer to be held at Krugersdorp Mess Hall, but rather at Roodeplaat (Dog School of the South African Police Services) outside Pretoria.

10] On 13 May 1999 the Respondents wrote to the Applicant's attorneys, advising them of the postponement of the hearing to the 24 May 1999, and also indicating that their approach would be to show that members acted collectively with regard to the different incidents. The Respondents also confirmed that the accused do not have a right to legal representation in terms of the collective agreement. They also indicated that the accused were already in possession of affidavits of witnesses which would be used in the hearing. These affidavits were those which had been used in the High Court application. The Respondents also requested details about the objections to the charge sheet and the effect the location of the hearing would have on the accused.

11] On 17 May 1999 the accused's attorneys responded to the Respondents' letter raising the same concerns as in the letter of 12 May 1998 and also suggesting a postponement of the hearing whilst an attempt was being made to serve the charge sheets on all the accused and also to attend to the amendment of the charge sheet. They then went on to reserve their rights with regard to the issue of legal representation and asked for statements and affidavits of witnesses to be used in the enquiry, a list of witnesses and the

name of the Chairman of the enquiry.

12] On 18 May 1999 the Respondents responded to the Applicant and indicated that transport would be made available to the accused as well as their witnesses to leave on Sunday morning 23 May 1999 going to the venue of the hearing. In addition to providing transport, accommodation would also be provided for both the accused and their witnesses. The Respondents indicated that the names of the witnesses and statements would not be made available to the accused. They were going to use the affidavits used in the High Court Application. Furthermore the hearing would be chaired by a Director of the department. On 19 May 1999 the Third Respondent wrote to the Applicant's attorneys advising them that he was of the opinion that the charges were clear.

The Issue

13] According to counsel for the Applicant, the Applicant is moving this application in terms of Section 157(2) of the Labour Relations Act, 66 of 1995, as amended by Act 127 of 1998 ('the Act"). Section 157(2) of the Act provides that:

The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

According to Mr Swain, the rights which the Applicant, on behalf of the accused, seeks to protect are the right to fair administrative justice and the right to information which the Respondent's action seeks or threatens to violate.

14] Sections 32, and 33, of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) read together with item 23 of schedule 6 to the Constitution deal with the rights of access to information and just administrative action. Item 23(2) provide as follows:

"(2) Until the legislation envisaged in Sections 32 (2) and 33 (3) of the new Constitution is enacted:

(a) Section 32(1) must be regarded to read as follows:

"(1) every person has the right of access to all information held by the state or any of its organs in any sphere of government insofar as that information is required for the exercise or protection of any of their rights" and

(b) Section 33 (1) and (2) must be regarded to read as follows:

"Every person has a right to:

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to reasons given for it where any of their rights is affected or threatened."

15] In its application papers, and also during argument, the Applicant reiterated the fact that it was not the intention of the accused simply to evade the disciplinary enquiries, nor had they attempted to evade the service of the charge sheets on the accused. The accused had in fact gone out of their way to instruct their attorneys to assist the Respondents in facilitating service thereof. They were only concerned about the threatened violation of their abovementioned rights.

16] I now turn to deal with the arguments of the parties before me. I do not intend dealing with all of the points raised during argument in the same order as counsel. I will deal firstly with the right to legal representation.

Legal Representation

17] The applicant argued that the accused are entitled to legal representation at the disciplinary hearing. Mr Swain argued that the accused have a right to legal representation as accorded to them in terms of Section 77(2) of the Correctional Services Regulations. He also argued that, in the event of that not being the case, the accused should be given legal representation anyway as there is nothing preventing same. In this regard he referred me to the judgment of Didcott J in *Dladla & Others v Administrator, Natal, & Others* 1995 (3) SA 769 (N). Mr Swain also submitted that the Respondents failed to

exercise their discretion as they ought to have done in refusing rights to legal representation.

18] Mr Nxusane, on behalf of the Respondents, argued that Section 77(2) of the Correctional Service Regulations was not dealing with representation in matters of misconduct, and furthermore, it had been repealed. The provisions applicable to misconduct matters are contained in the collective agreement entered into between the Applicant and the Department of Correctional Services.

19] It is apparent from the Respondents' testimony, which was not disputed by the Applicant, that in terms of a resolution dated 15 March 1997, passed by the Chamber of the Public Service Bargaining Council for the Department of Correctional Services, a collective agreement, incorporating a disciplinary code/ procedure, was adopted. It became operational with effect from 1 June 1997. When the Public Service Labour Relations Act 1994 was repealed by the Labour Relations Act, 66 of 1995 the collective agreement was adopted in terms of Schedule 4 Part D, item 15(i) to the Act.

20] Schedule 4 to the Act has Dispute Resolution Flow Diagrams. Part D of Schedule 7 to the Act deals with Public Service Transitional matters. I believe that the Respondents meant Section or Item 15(i) of Schedule 7 of the Act as that is the section which adopts Public Service (collective)

agreements concluded in terms of Section 13 of the Public Service Labour Relations Act 1994. Accordingly, the current position is that the collective agreement which was adopted on 15 March 1997 is applicable to the department and all its employees. See *Turner v Jockey Club of South Africa* 1974(3) S.A. 633(A) at 645H.

21] I have considered Section 77(4) of the Correctional Service regulations. The sub section does refer to hearings in matters of inefficiency or unsuitability of employees who are not commissioned officers. In the absence of any other evidence, I agree with Mr Nxusane's submissions that it has to do with a disciplinary hearing in matters relating to inefficiency or unsuitability of a member who is not a commissioned officer. Furthermore, it is also apparent that the collective agreement contains the rules which govern disciplinary hearings relating to misconduct within the department. This evidence has not been controverted by the Applicants.

22] I have considered the judgement referred to by Mr Swain (*Dladla & Others*, **supra**) and I have no doubt in my mind that it is distinguishable from the current case and is not relevant to the facts of the present case. Didcott J expressly stated that once legal representation is neither allowed nor disallowed by any statute, regulation or rule governing proceedings, then an occasion arises for a discretionary decision to be made on the point. It is totally different to the current situation in that, *in casu,* there are rules (the

collective agreement) governing the disciplinary hearings, which was not the case in *Dladla*. In that case, they relied on a convention being used in the department to the effect that legal representation was not allowed.

23] Paragraph one of the collective agreement provides that the agreement is applicable to all employees, except for the commissioner who is governed by the Public Service Act. In terms of paragraph 5.4.1 of the above-mentioned collective agreement, the right to representation has been provided for as follows:

"5.4.1 **The Right to Representation**

Every employee has the right to be represented by a fellow employee of his choice, or a representative of his employee organisation (shop steward) and a union official, should he so wish. Affiliated employees, in other words employees who belong to an employee organisation, are thus entitled to be represented by at most two representatives, while unaffiliated employees, in other words employees who do not belong to an employee organisation, are entitled to be represented by one representative (fellow employee)."

24] It is clear from the aforegoing paragraph from the collective agreement what the intention of the parties was. No legal representation was to be allowed in matters of this nature. Representation is limited to union representatives.

25] In the matter of *Lace v Diack & Others* (1992) 13 ILJ 860 (W), Van Zyl J had to deal with the issue of legal representation in an internal disciplinary

enquiry in a company where there was a disciplinary code which allowed only representation at a disciplinary enquiry by an employee representative or shop steward. At 865D-F, Van Zyl J held:

"There is certainly no absolute right to legal representation in our law, to the best of my knowledge, although I am of the opinion that, where an employee faces the threat of serious sanction such as a dismissal, it may, in the circumstances, be advisable that he be permitted the representative of his choice. This approach may be considered in complex and difficult matters in which legal representation may be regarded as essential for a fair hearing (Baxter, *Administrative Law*, (1984) at 555-6) Our law has not, however, developed to a point where a right to legal representation should be regarded as a fundamental right required by the demands of natural justice and equity. It may well be that, in time to come, public policy may demand the recognition of such right. In my view, however, that time has not yet arrived. In this regard guidance may be found in English law, which likewise does not recognise an absolute right to legal representation. See W Wade Administrative Law (6th edition 1988) at 546; PP Craig *Administrative Law* (2nd edition 1989) at 220; D Foulkes *Administrative Law* (7th edition 1990) at 298-300)."

26] I agree with the views of Van Zyl J as set out above. It might however be argued that after the 1994 constitutional dispensation which brought about constitutionalism and the adoption of the fundamental bill of rights in our country, the failure to allow legal representation, in internal disciplinary enquiries violates the constitutional right of an employee to a fair trial. I do not believe that that will be the case. It will, in my view, depend on whether there is a disciplinary code or collective agreement between the union and the employer which governs the situation. If not, it might have to be

considered with regard to the circumstances of each case, considering the nature, scope or circumstances of the particular disciplinary enquiry and the charges which the employee is facing.

27] In *Cuppan v Cape Display Supply Chain Services* 1995 (5) BCLR 598 (D), Page J considered the issue of legal representation by a practitioner of choice in a company where the disciplinary code provided that the hearing should be "in accordance with natural justice". The employee contended that such term included the right to a fair hearing which in turn required legal representation by a practitioner of his own choice. The learned judge held that the right to be legally represented is to be sought in the contract itself. He further held that the express provision of a particular form of representation and the absence of provision for any other form of representation or of any general right to representation, gave rise to an inference that no other form of representation was intended. Accordingly he found that the right to a fair trial only applied to persons accused in a court of law (Section 25(3) of Act 200 of 1993, (the right to fair trial in the Interim Constitution of SA) had no application to domestic disciplinary tribunals. See also the views of Harms J in *Lamprecht & Another v McNeillie* 1994 (3) SA 664 (AD) and Hancke J in *Myburgh v Voorsitter Van Die Schoemanpark Ontspanningsklub Dissiplinêre Verhoor & Ander* 1995 (9) BCLR 1145 (O). Similarly the same right cannot be inferred in terms of Section 35(3) of the Constitution of the Republic of South Africa Act No. 108 of 1996 (the Final

Constitution). The right to a fair trial has to deal with persons who are accused in a court of law. As to whether public policy might in future demand the recognition of such right in disciplinary hearings, I am also of the view that that time has not as yet arrived especially in light of the fact that even in terms of the Labour Relations Act officer bearers or officials of trade unions or employers organisation have also been given right of audience in the Labour Court and the Labour Appeal Court. I, also, can see no good reason to extend the right to the accused in the present case.

28] Accordingly, it is clear that the inference which is to be drawn from the collective agreement signed by the parties in this matter, is that as there is no other form of representation allowed except for representation by a fellow employee or shop steward, no other right to representation was intended to be conferred upon an employee at such an enquiry.

29] Lastly, I also agree with the submissions of Mr Nxusane, that in the event of the accused feeling that the charges are complex and that there is a need for legal representation, or that justice would only be done by having legal representation, the appropriate remedy for accused would be to raise this issue with the chairman of the disciplinary enquiry. At this stage, the accused have not shown a prima facie right for this Court to intervene on the basis of a threatened violation of this right, as the right does not exist.

Charge Sheet and Disciplinary Enquiry

30] I will now turn to deal with Mr Swain's attack on the disciplinary charge sheet as being vague and embarrassing and denying the accused their right to fair administrative justice, and also the Respondents' failure to disclose relevant information to the accused.

31] It is apparent from the evidence above that on 12 May 1999 the Applicant's attorneys wrote to the Respondents objecting to the charge sheet. There were a number of issues raised in the aforesaid letter. Those are the issues which formed the basis of this application. Furthermore, in their letter dated 17 May 1999, the applicants' attorneys indicated that their view was that the charge sheets were "vague and embarrassing in that, amongst others, it is impossible for the various members to properly prepare for the charges brought against them on the information given to them, there was improper joinder of charges and that the charges are unspecific". With regard to the Respondents' comment that the approach would be to show that the members acted collectively with regard to the relevant incidents, the accused's attorneys indicated that it was not clear to them to which members this applied and to which particular incidents.

32] During argument Mr Swain referred to the judgment of Milne J in the matter of *Van Wyk v Director of Education and Another* 1974 (1) SA 396 (N), a case

relating to a disciplinary charge sheet for a teacher which the Court found to be defective. Milne J went on to hold that factual information, as to the nature of an allegation against an accused person, is necessary in a criminal trial and there is no reason, in principle, why the position should be different in an enquiry before a disciplinary body, particularly one which has the power to make findings of far-reaching consequences. Mr Swain submitted that the furnishing of factual information in a disciplinary enquiry should be the same as in a criminal trial. I agree that it should be sufficient for an employee to know the case he is expected to meet. Anything short of that would be unfair.

33] In the present case there are 44 accused. There are 15 counts preferred against each one of the accused. Most, if not all, of the charges are vague and in need of further particularity. I will, as an example, refer to count 2. Most of the features of count 2 are common with regard to other counts. Count 2 was framed as follows:

Count 2: Transgression 5.3(column 1)

During October 1998 <u>you</u> intimidated Mr GM Buthelezi by threaten (sic) him on his cellular phone, insisting that he leave his place of work 'If not he will see".

34] I raised my concerns with regard to count 2 with Mr Nxusane and he conceded, and rightly so, that it was vague and the person against whom this count was preferred would not be able to prepare properly for the

hearing. The Applicant's counsel raised a concern about the reference to "you" which was a common feature to all the counts. It was not clear as to whom the "you" is referring as there are 44 accused. Furthermore, with regard to count 2, it is clear that it could only have been one of the accused (or any other person for that matter) who might have spoken to the complainant over the telephone at any one given time. It is highly improbable that all 44 accused could have done so unless there were a number of calls at different times. If so, the time should be specified. It is clear from the above count that it is in dire need of particulars. The concerns which have been raised with regard to count 2 can also be raised with regard to the following counts:

Count 9: (alternative) Transgression 5.3 (column 1)

During December 1998 you intimidated Mr G M Buthelezi by showing him a firearm and demanding that he stops his car and return to his office, which he did at the Provincial Commissioner Office, Kwazulu-Natal.

Count 10: Transgression 5.3 (column 1)

During January 1999, you intimidated Mr G M Buthelezi by calling him on his cellular phone and informed him that he should not return to his office or else he will be killed.

Clearly only one person can point a firearm. As indicated with regard to count 2, not all of the 44 accused could have been in a position to call the complainant on the cellular phone as stated in respect of Count 10.

35] I have no doubt in my mind that great prejudice would have been suffered by the accused in having to prepare for charges of this nature. I had a look at the other charges, and the ambiguity and vagueness is repeated in a great number of them. All of the charges do not indicate as to when the incidents referred to therein occurred. At least 9 of the counts do not indicate where that particular incident occurred. (Counts 2, 7 (alternative count), 8, 10, 15, 16, 18, 19 and 20). The accused are from different parts of Kwazulu-Natal. Count 12 refers to an incident which occurred in Pietermaritzburg without specifying exactly where in Pietermaritzburg whether in the Provincial Office or at the Pietermartizburg Prison or in the Commander's Office at the Pietermaritzburg Prison.

36] Mr Nxusane argued that the standard for a disciplinary charge sheet cannot be the same as for one in a criminal trial. I agree with Mr Nxusane's argument in this regard but would add that the furnishing of factual information as to the nature of the allegation against an accused, for the accused to know what case to meet should be similar. The information on the charge sheet must be sufficient to make the accused's right to prepare a real and not an illusory right. In *Mkhize & Others v Chapelot Industries (Pty) Limited* 1989 (10) IJL 903 At 906D the Industrial Court found a disciplinary charge sheet to be hopelessly inadequate to enable the Applicants to prepare their case as it failed to provide the date, time and place of the

alleged theft nor was there any indication as to what is alleged to had been stolen. Obviously Mr Nxusane's approach has been rejected by the courts dealing with the labour matters. In the premises, I do believe that the Respondents should have been more detailed and prudent in the manner in which they dealt with this particular matter, especially as they were brought to their attention, and they knew the consequences of the hearings. I am of the opinion that the views of Milne J in Van Wyk's case (supra) should guide the Respondents in this regard.

37] Even though I am of the view that the Applicant's attorneys could have been more detailed in identifying to the Respondents what their concerns were in relation to each of the charges. I do not accept Mr Paxton's contention, which he made in the Respondents' answering affidavit, that they only became aware of the problems of the Applicant's members when they received the application papers. They became aware of the reasons why the accused were concerned about the allegations that the accused acted collectively, as early as 17 May 1999. Instead of dealing with them the Respondents referred these concerns to the initiator (third Respondent) who merely repeated what had been previously stated that they intend showing that the members associated themselves with regard to each charge. The initiator seemed to have merely repeated what had been stated by the Respondents in earlier correspondence in a slight different form. He did not apply his mind properly to the issues so as to furnish the relevant particulars

and was merely oblivious to everything else raised by the applicant's attorneys.

38] Furthermore, it is clear that these incidents occurred in various areas as is apparent from the charge sheet, for example, some occurred in the Pietermaritzburg Provincial Office and two of the charges relate to incidents in Newcastle (counts 17 and 23). In the absence of further particularity as to why all of the 44 accused, who are from the various areas of command, have been linked in this one charge sheet, and in the absence of an allegation with regard to whether they acted in common purpose or not, I believe that there is justification for the concern and there will be a grave failure of justice which can only be cured by a properly drawn and drafted charge sheet which indicates who participated in what, where and when. If the intention of the Respondents is to testify that the accused acted collectively in consort or with common purpose, and therefore all are responsible for the actions of others, that would have to be specified so that they could be in a position to know what case to prepare. Furthermore, particulars would have to be furnished of the way in which they are alleged to have made themselves parties to a common purpose or the alleged collective action which of the accused participated and in respect of which charges. This would enable the accused to prepare for this hearing. In *S v National High Command* 1964(3) SA 462 at 464 A-B De Wet JP stated:

"Now it is clear that where a common purpose is alleged, the state has to supply particulars of the

facts on which it will rely in order to ask the court to draw an inference that each and every one of the accused was a participant in the conspiracy, or party to the alleged common purpose. The particulars in this regard, as far as the present case is concerned, are set out in annexure A." (my own emphasis)

See also *R v Moilwanyana & Others* 1957(4) SA 608 at 617.

39] The same approach has to be adopted in Labour matters. The individual accused, are entitled to the aforesaid details as to the role they played with regard to each of the counts as this would be necessary for them to, not only prepare their defence, but it may happen that, depending on the information furnished in the particulars with respect to the case against each of them, they might find that there is a conflict of interest between them in which case they may decide to be separately represented instead of being represented by one shop steward. This is of significance as it goes to the right of the accused to be able to be represented by a shop steward of his own choice.

40] The Applicant has also raised a concern about the fact that the third Respondent had improperly joined a number of disparate alleged offences. The offences, as already stated, cover a period between August 1998 and February 1999. In response to requests for information, the Respondents indicated that they were going to rely on affidavits which had been filed in the High Court application. According to the Applicant, the fourth accused is only linked to an incident on 15 January 1999 in those affidavits. The only allegation against the 32nd accused in the High Court papers relates to an incident on 10 December 1998. The 33rd up to the 44th accused were not

Respondents in the High Court application, but they have been joined as accused in the contemplated disciplinary hearing.

41] The disciplinary hearing has been moved to Roodeplaat in Gauteng, even though the incidents which are the subject matter of the disciplinary hearing are alleged to have occurred in amongst others, Pietermaritzburg and Newcastle in the KwaZulu-Natal province. In response to the complaint about the location of the disciplinary enquiry, the Respondents have indicated that they would provide the accused and their witnesses with transport to and accommodation in Gauteng.

42] During argument, Mr Nxusane, on being questioned by this Court as to how they intend to run a hearing with 44 accused charged with 24 counts, indicated that the hearings would deal with the accused on an individual basis, sequentially, ie that the first accused would come in; charges would be preferred and evidence would be led against him on all the counts; thereafter they will finish with the first accused and move on to the next one until they have dealt with all of them. While they are dealing with the first, all the others will be waiting for accused number one to finish his particular case. I raised a concern with the Respondents' representative during argument, as to why the hearing could not take place in KwaZulu-Natal. I was of the view that, if the concern is intimidation and violence as alleged in the papers, the necessary security arrangements could have been made by

the First Respondent, who happen to be part of the Government. The state has the resources, including, a police force and an army. Furthermore, there is no explanation as to why, if there is a threat of violence within the prison precinct, the hearings were not simply moved out to a nearby city, where it would be convenient for most of the accused. I was not convinced that this is the only reason. The trial may have been moved to meet the convenience of the Respondents.

43] Whilst the sequential hearing is proceeding, the questions that the Respondents need to consider are: What will be happening to the witnesses of the accused whose case would be called last? If the witness is employed, what leave arrangements will he make with his employer in this uncertain state of affairs? I do believe that there is a clear disregard on the part of the Respondents for the rights of the accused as well as their witnesses. This may, obviously, lead to the accused not being able to procure witnesses to lead evidence on their behalf due to logistical problems. This, in my view, is indirectly denying the accused the right to call witnesses to this enquiry, which is a right guaranteed in terms of the collective agreement. Unless the charge sheets are properly drafted and it is indicated as to when a particular accused will appear, I do believe that there would be prejudice in this regard.

44] The cornerstone of Labour Law in this country is equity and fairness. The Respondents do not seem to be appreciating that. There is nothing unlawful about moving the disciplinary enquiry to another province. However, it could never be fair

for an accused to be moved away from his home base to another province where a hearing will be held unless there are special circumstances, for example, the transgressions which are the subject matter of the enquiry occurred in that province. I do not believe that the fear of intimidation and violence is one of those. *In casu*, even when the accused is in Gauteng he does not know when his matter will be called. He could sit there for a day, two days, three days before the initiator gets to his case and deals with it. This action of moving the disciplinary enquiry to Gauteng also fails to take into account the traumatic effect a disciplinary hearing, on its own, has on the charged employee. More so, if the employee is removed from his home, from the support system of his family and relatives and a familiar environment. I do believe that there is potential for a travesty of justice in this regard. This court would be failing in its duty if it did not interfere because the Respondents' action of relocating the hearing is lawful, no matter how unfair or inequitable it is. This court is empowered to query or interfere with an unfair or inequitable act. In this regard refer to Sections 1(a) and 157(2) of the Act together with Section 23(1) of the Constitution. See also Goldstone J in *Marievale Consolidated Mines Limited v the President of the Industrial Court & Others* 1986(7) ILJ 152 at 165 F-G.

45] The above-mentioned sub-paragraph 5.4.1 of the collective agreement which deals with representation goes on further to deal with the issue of how the representatives are to be appointed by the accused employees. The said paragraph deals with that aspect as follows:

"An employee representative who is employed by the department of Correctional Services (fellow employee/shop steward) should be from the same common area than the accused. The representative will only be permitted to represent another employee during official time if he is from the same command area. However, in the case of transgression which could lead to dismissal, any representative employed by the department in the same province as the accused employee will be permitted to represent the accused during official time. In addition to this, the department will allow every national office bearer of each union six (6) months (provisionally) from date of implementation of this procedure to represent any accused employee nationally in the case of a transgression which could lead to dismissal." (own emphasis)

46] It is clear from the abovementioned passage that each of the accused is entitled to representation by at least one representative. The matter has been moved out of the province and the witnesses and the accused have been offered transportation and accommodation. At no stage have the Respondents indicated whether accommodation and transport would be offered to union representatives of each of the accused people. Unless the accused chooses a representative who is a national office bearer, he cannot be represented by a union official from Kwazulu-Natal who is not a national office bearer, if he is not in a position to pay for his subsistence and travelling. What will then happen to the underprivileged or poor employees? The freedom to be represented by a representative of your choice from your area of command is removed. Concerns similar to the ones raised above were raised by Steyn AJ in *Pennington v Minister of Justice and Others* 1995 (3) BCLR 270(C). Although it was dealing with a criminal matter I think the concerns raised are relevant in this matter.

47] The Applicant also raised concerns about the notice period for the disciplinary hearings. I do not think that this issue which was still of concern as the disciplinary hearing was adjourned from 17 to 24 May 1999. The collective agreement provides that a charged employee should get seven (7) days notice. Furthermore, in argument, Applicant's counsel never raised that particular issue. The other concern which was raised by the Applicant's counsel related to the fact that not all of the accused have been served with copies of the charge sheet. However I do not believe that it is a matter which will lead to a grave injustice, as those accused who have not received the charge sheet, in my view, do not have to travel to Roodeplaat, Gauteng to the hearing as they have not been properly notified of same.

Disclosure of Information

48] The accused also requested information from the Respondents, who advised them that they intend relying upon the affidavits filed in the High Court matter. They then asked the accused to obtain affidavits from the High Court file. According to the evidence before me, accused numbers 33 - 44(both numbers inclusive) were not party to the High Court application. Under normal circumstances they would not have been served with the application papers in that matter. The Respondents in their letter dated 18 May 1999 which is referred to above, gave no reasons for not furnishing the

applicant's attorneys with the list of witnesses or any other statements which they may have in their possession other than the affidavits. In the answering affidavits which the Respondents filed in court, they have indicated that the names of witnesses were not furnished because of the fear of intimidation of the witnesses.

49] The Respondents have not said that the accused are not entitled to the information requested but have referred them to the High Court Application papers. I also did not understand Mr Nxusane to dispute this. I fail to understand on what basis the Respondents were refusing to furnish the accused with the copies of statements/affidavits. They had requested the statements to enable them to prepare for trial. Not all of the accused were Respondents in the High Court case and thus would not have been in possession of the affidavits. There is no indication that Von Klomper Davis & Harrison were acting for all of the accused. In their correspondence to the department they had indicated that they were acting for B R Ngcobo and "certain others". The accused, who had not received their affidavits were entitled to receive copies of same from the Respondents as the Respondents were not challenging their entitlement to the statements. Preparation for trial does not only start and stop with the preparation which is done by a representative or an attorney. The employee who has been charged also does some preparation, and thus would need to have those particular documents given to him especially if he is not represented. Once

the parties agree to exchange the documents, in all fairness, the employer should ensure that whoever is accused receives a copy of the documents, which have been requested unless other mutually acceptable arrangements are made with the accused person or his representative. The same would apply to documents in the accused employees' possession.

50] The applicant's attorneys also requested to be advised of the name of the chairperson of the disciplinary enquiry. In argument, they indicated that they sought the name because of the importance of the dispute to them. The matter was also sensitive and they felt that due to the prejudice and bias which might emanate from people who are within the department, it was necessary for them to know the name of the person early so as to decide the accused's rights in this regard. On the other hand, Mr Nxusane indicated that they did not disclose the name because of the fear of intimidation of the Chairman. The jobs and livelihoods of the accused are at stake and they have every right to know whether the person who is going to decide their fate is an impartial person or not. As things stood, the accused's future was in the hands of an official of the department. It is understandable for the accused not to be trustworthy of an official emanating from the department in light of the fact that, it is the very department which has brought the charges against them. The refusal by the Respondents to furnish the applicant with the name or to make some form of compromise which would satisfy the accused who were concerned about their fate shows that the officials were

not exercising their discretion freely and fairly instead they fettered their discretion with only the considerations of intimidation and violence, sacrificing all elements of fairness in the process. I do not understand why this fear of intimidation of the Chairman could not have been conveyed to the applicant's attorneys before the matter was referred to this court. I have considered the Respondents' concerns in this regard. In my view, there is no reasonable risk that such disclosure might lead to intimidation as alleged by the Respondents or obstruction of the proper ends of justice. This concern cannot be justifiable, simply because on the very first day of the hearing, the accused will know the identity of the Director of the First Respondent who is chairing the disciplinary enquiry. If there was to be any intimidation, that intimidation could still proceed even after the hearing has commenced. If the Respondents' fear is that if there is intimidation prior to the hearing, then the hearing would not commence, I can only think of one solution, namely not to disclose the Chairman's name until the date of the hearing. However, I do believe that fair administrative justice calls for the Respondents to know who will decide their fate. They might even have an input as to whether he will be suitable or not due to past experiences they have had with him. That might actually call for the Respondents to consider going to independent external organisations which provide to employers the service of impartial chairmen of, disciplinary enquiries without having to deal with this particular problem. I have to balance the accused's right to a fair hearing against the legitimate interest of the Respondents of ensuring that

the disciplinary enquiry proceeds. I do not think that the identity of the Chairperson should be treated in the same manner as a person would treat the identity of a police informer or a secret witness in a trial. Accordingly, I do believe that the name of the chairperson of the enquiry could be disclosed to the attorneys, who are directed to treat the name with prudence to ensure that the said chairperson is not intimidated in any manner. The refusal to disclose the name of the Chairman cannot be justified in this "legal culture of accountability and transparency" (per Mohammed DJP, as he then was, in *Tshabalala & Others v Attorney General, Transvaal & Another* 1995 (12) BCLR 1593 (CC) at 1605 F) in which we currently live.

51] The Respondents have indicated that the accused should have exercised their rights in terms of Section 16 of the Act in ensuring that whatever information they needed was furnished to them by referring the matter to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). It is apparent on going through the documentation that the Applicants started raising the concerns regarding the enquiry during May, and the Respondents were committed to holding the enquiry on 24 May 1999. They did not entertain any suggestions about a postponement. I accept that the remedy available to the accused is to proceed in terms of Section 16 to obtain the relevant information as provided for in the Act. However, I do believe that there are situations where it might be necessary to seek relief on an urgent basis from this court. The Labour Court had previously granted an interdict

for purposes of assisting employees to obtain relevant information. In this regard see *Numsa & Others v Comark Holdings (Pty) Limited* 1997 (5) BLLR 589 (LC). The Labour Appeal Court in *Kgethe & Others v LMK Manufacturing (Pty) Limited & Another* 1998 (3) BLLR 248 (LAC) at 259 B-C, held that the Labour Court has the power to order the disclosure of information bearing on the existence or otherwise of certain rights. Furthermore, the court went on to say that such an approach not only promotes fairness but it is also practical in that it facilitates the estimation of what rights exist and may have the effect of obviating unnecessary litigation. In light of the aforegoing, I do not have any problems with the approach which was adopted by the Applicant in this matter. The Constitution confers upon citizens of the country a right of access to information and just administrative action and the onus of proving, on a balance of probabilities, that the limitation of these rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors, rest upon the Respondents. See Section 36 of the Constitution, *Khala v Minister of Safety & Security* 1994 (4) (SA) 228 and also *Els v Minister of Safety & Security* 1998 (4) BCLR 434 at 440.

52] This Court has, on a number of occasions, refused to intervene where parties have come to it seeking it to intervene prior to the hearing of a disciplinary enquiry (See *Ndlovu v Transnet Ltd t/a Portnet* [1997] 7 BLLR 887 (LC); *Maropane v Gilbeys Distillers Vintners (Pty) Ltd & Another* [1997]

10 BLLR 1320 and *S J Van Zyl v SFF Association, case no. J2533/98* unreported judgment of Zondo J). This matter is distinguishable from the above cases. In *Ndlovu v Transnet* the Labour Court found that on the facts an intervention was not called for. In the *Maropane* case the court was being asked to intervene over a private sector employee. Section 157(2) at the time only gave this court the jurisdiction to intervene in where the violation or threatened violation of constitutional rights was by the State in its capacity as an employer. In the *S J Van Zyl* matter the court was also not being asked to intervene on the basis of a threatened violation of a constitutional right but to intervene in terms of Sections 185 and 187 of the Act. The other cases in which this court has considered whether to intervene or not are *Richards Bay Iron and Titanium (Pty) Ltd t/a Richards Bay Minerals & Another v Jennifer Jones & Another* (1998) 19 ILJ 627 and *Avroy Shlain Cosmetics (Pty) Limited v Kok & Another (1998)* 19 ILJ 336 (LC) the Labour Court also refused to intervene where it was asked to decide on the existence or not of an employment relationship in matters which were already before the CCMA. The circumstances of this case are different as is shown hereinafter.

53] In *Wahlhlaus v Additional Magistrate (Johannesburg)* 1959 (3) SA 113 (A). Oglive Thomson JA, when dealing with the power of a superior court to intervene in proceedings of a lower court at pages 119H-120E held that:

"By virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief by way of review, interdict or *mandamus* – against the

decision of a magistrate's court given before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. … and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained …
In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's court … As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

54] The High Court would intervene only if it were satisfied that in the particular circumstances a grave injustice might result. This Court has the same status as that of the High Court. The principle in the *Wahlhlaus* case, above, applies in criminal matters. However, the said principle has been equally applied in civil proceedings and also extended in the labour law field. See *Towles, Edgar Jacobs Limited v President Industrial Court & Others* 1986 (7) ILJ 496 (C) at 499I-J. I do believe that the circumstances of this case are not different in that it is one of those rare cases where the superior court would intervene. In the matter of *Van Wyk v Midrand Town Council & Others* 1991 (4) SA 185, Lazarus J, referred to *Van Wyk v Director of Education*, above, with approval and thereafter stated at 189C-D that *"there is no difference between the principles applicable to interfering with criminal proceedings in a lower court and proceedings in a disciplinary enquiry before a disciplinary board".* If an accused person was expected to proceed with his defence in a trial or disciplinary hearing without the necessary particulars having been furnished the High Court would intervene under those circumstances even if the trial or hearing had commenced. See *Van Wyk v Director of Education*, **supra**, *Van Wyk v Midrand Town Council* **supra** and in *Weber & Another v Regional*

Magistrate, Windhoek 1969 (4) 394 (SWA). In the *Weber* case at page 397G Muller J after referring to the principles in *Wahlhlaus* stated:

"Among the "rare cases" in which Supreme Court has on occasion thought fit to intervene in unconcluded proceedings in Magistrate Court cases where the accused complained that the charge against him lacked sufficient particularity. An accused person is entitled to such particulars of the offence with which he is charged as will sufficiently inform him of the case that he has to meet and enable him to prepare and present his defence. If the charge is deficient in this respect, and the magistrate refuses to direct that the state furnish such particulars as are necessarily required for purposes afore stated, the accused need not abide by the magistrate's ruling but can apply to the Supreme Court for its intervention in the proceedings of the lower court."

55] I am of the opinion that this is one of those rare occasions where not to grant the relief sought would lead to grave injustice, and where justice might not by other means be attained. This is so if one takes into account all the above-mentioned transgressions, which have been committed by the state acting in its capacity as an employer in this matter. Accordingly, in accordance with the provisions of Section 157(2) of the Act I have jurisdiction to intervene in these circumstances. This remedy should be used by this Court with circumspection. As stated in *Wahlhlaus,* above, a higher court would be reluctant to intervene in uncompleted proceedings of the court below because of the possible effect such procedure would have in the continuity of the proceedings in the court below. However, *in casu,* the facts are slightly different as the disciplinary hearing has actually not commenced. I do believe the circumstances of this case warrant intervention, so that the rights of the individuals concerned are not trampled. In particular, the

number of people who might be affected by whatever violation of the very bill of rights, which is the foundation of this democracy, calls for my sense of justice to intervene.

56] The Applicants have submitted that their members rights to fair administrative action and access to information as protected in the Constitution are being violated by the Respondents. Our courts have held that the right to fair administrative justice extends beyond the rules of natural justice in our law. See *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) at 1214A -H. Farlam J at 1214, whilst dealing with the right to fair administrative action as was contained in the Interim Constitution (Act 200 of 1993) stated that:

"It follows from what I have said that even if Section 24(b) is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under the paragraph is entitled in appropriate cases to more than just the application of the *audi alteram partem* and the *nemo iudex in sua causa* rules. What he is entitled to is, in my view, what Lord Morris of Borth-Y-Gest described as "the principles and procedures … which, in the particular situation or set of circumstances, are right and just and fair." …

The correct interpretation of the meaning of "the right to procedurally fair administrative action" entrenched in Section 24(b) of the Constitution must be a "generous" one "avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights … referred to", to adopt the language of Lord Wilberforce in *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* (1980) AC 319 (PC) at 328-9, an approach which has been approved by the Constitutional Court in *S v Zuma and Others* 1995 (1) SACR 568 (CC) at 587c-g and *S v Makwanyane and M Mchunu*, case CCT/3/94 delivered on 6 June 1995 (per Chaskalson P, at paragraph 10 of the unreported judgment) : see also *R v Big M Drug Mart Ltd* (1985) 18 DLR (4^{th}) 321 at 395-6 (also approved in *S v Zuma* (supra) at 578h-579b) where Dickson J, as he then was, when discussing how this meaning of a right or freedom guaranteed under

Canadian Charter of Rights and Freedoms is to be ascertained, said:

"The interpretation should be … a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."

57] I am, with respect, in full agreement with the principles enunciated and reasons given by Farlam J that the correct interpretation of the right to fair administrative justice contained in Section 24(b) of the interim constitution, now to be found in Section 32 (read with Schedule 6) of the final Constitution, must be a generous one. A legalistic interpretation of the right will not be appropriate in the case of Labour Law in which equity and fairness play a pivotal role.

58] I do believe that intervention by this Court will be appropriate where the unreasonableness of the action which the state intends to take is so gross that it could be inferred that it is acting *mala fides* or with an ulterior motive. As it might be inferred in this case. Accordingly, I believe that the provisions of section 157(2) of the Labour Relations Act call for me to intervene in circumstances where the fundamental rights of individuals are threatened by the State. The very State which in terms of Section 7(2) of the Constitution is expected to respect, protect, promote and fulfil the rights in the Bill of Rights.

59] It is also clear from the facts which were put before this Court that the Respondents, in dealing with this matter, approached it in a very cavalier

manner. Disciplinary enquiries are serious (especially if they may lead to a dismissal). They should be treated as such. It is improper for the state to deal with concerns which are raised in this manner. It would be appropriate for the state to be aware of the fact that, the more drastic the action which is taken or likely to be taken, the more detailed the reasons should be advanced in the event of the people affected questioning the same. The degree of seriousness of administrative action, therefore, determines the particularity of the reasons required See *Moletsane v The Premier of the Free State & Another* 1995 (9) BCLR 1285 (O) and *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998(8) BCLR 1024(W).

60] In light of all the reasons given above, taken collectively, it is clear to me that the Applicant has complied with the first requirement for the granting of an interim interdict, namely that they have set out a *prima facie* case, except with regard to the case of legal representation. Secondly, I am satisfied that the other requirements for the granting of an interim interdict, namely the absence of an alternative remedy, the reasonable apprehension of harm are present in this particular case. Finally, the court has also satisfied all the relevant factors concerning the balance of convenience. The court is satisfied that the balance of convenience favours the applicant in this matter.

Order

61] In the light of the aforegoing I will grant the interim order. It is hereby

ordered:

62.1That the provisions of the rules and statutory provisions relating to time limits were dispensed with and that this matter was heard as a matter of urgency;

62.2That a rule *nisi* be and is hereby issued calling upon the Respondents to show cause on or before 21 June 1999 at 10h00, or so soon thereafter as the parties may be heard, why an order should not be granted in the following terms:

62.2.1 that the charge sheet issued by the Third Respondent and annexed to the Applicant's founding papers as Annexure "E", be and is hereby declared invalid and unlawful;

62.2.2 That the Respondents are ordered to make available all and any statements relevant to the issues referred to on the charge sheet issued by the Third Respondent and annexed to the Applicant's founding papers as Annexure "E";

62.2.3 That the Respondents are ordered to disclose to the accused's attorneys of record, (who are directed not to divulge such information), the identity of the Chairman of the disciplinary enquiry initiated by the Respondents against the Applicant's members by way of the charge sheet issued by the Third Respondent and annexed to the Applicant's founding papers as Annexure "E";

62.2.4 That the Respondents be and are hereby interdicted from proceeding with the disciplinary enquiries based on the charge sheet issued by the Third Respondent and annexed to the Applicant's founding papers as Annexure "E";

62.2.5 Why the Respondents should not be ordered to pay the costs of this application;

62.3. That paragraph 62.2.4 hereof shall operate with immediate effect as an interim interdict pending the final determination of this application;

[63] The costs of today's proceedings are reserved.

_____

T JALI A J
Acting Judge of the Labour Court

DATE OF HEARING: 21 May 1999

DATE OF JUDGMENT: 21 May 1999 (ex tempore)

FULL REASONS: 7 June 1999

For the Applicant: Advocate K.G.B. Swain S.C. instructed by Von Klomper, Davis and Harrison

For the Respondents: Advocate J Nxusane instructed by the State Attorney (Natal)