REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No: D 513 / 99

In the matter between:

MANDLA STANLAUS CHAMANE Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR TRANSPORT, KWAZULU-NATAL 1ST Respondent

DIRECTOR-GENERAL FOR THE PROVINCE OF

KWAZULU-NATAL 2ND Respondent

DEPUTY DIRECTOR-GENERAL. DEPARTMENT

OF TRANSPORT, KWAZULU-NATAL 3RD Respondent

JUDGEMENT

LYSTER A J:

1. Applicant in this matter is an inspector in the Department of Transport, and is the subject of internal disciplinary action, arising out of *inter-alia*, the alleged unlawful discharge of his firearm, and threatening and abusive behaviour to a supervisor. These incidents took place at different times in April and June of 1998.

2.1 He was charged in terms of section 22 (1) of the Public Service Act and a disciplinary enquiry in respect of the first set of charges was convened in March 1999, and Applicant attended with his attorney.

2.2 The prosecuting officer objected to the presence of an attorney, and the chair of the disciplinary hearing adjourned the matter to obtain a directive from his superiors as to whether legal representation should be permitted.

2.3 On 22 April Applicant appeared at a further disciplinary enquiry in respect of the second set of changes against him, and again requested permission for his attorney to represent him.

2.4 The prosecuting officer objected and the presiding officer adjourned the enquiry for a short period, during which he contacted Third Respondent who advised him that legal representation should not be allowed.

2.5 When the inquiry resumed, Applicant declined to participate any further in t he proceedings, and instructed his attorney to request Third Respondent to suspend all enquiries until such time as a Court of law had pronounced on his right to legal representation.

2.6 When the first inquiry, referred to in paragraph 2.2 above, resumed, Applicant was advised that Third Respondent had advised that no legal representation be allowed. Applicant refused to participate further in the proceedings.

3.1 Applicant then instituted the current proceedings, in which he sought to interdict all Respondents from proceeding with all disciplinary enquiries pending the outcome of the Court's decision as to whether the Applicant be entitled to legal representation.

3.2 The matter is somewhat complicated by the fact that, in the absence of the Applicant, the chairperson of one of the disciplinary enquiries, went ahead with the enquiry found the Applicant guilty as charged, and fined him R 6000-00.

3.3 In respect of the second disciplinary inquiry, by agreement between the parties, it was agreed that the inquiry would proceed no further until this Court had made a decision with regard to the issue of legal representation.

3.4 In the circumstances, the need for this court to consider the granting of an interdict falls away. Logically, this court would then only be left with the duty to consider the issue of legal representation.

3.5 However, Applicant has further complicated the matter by amending the notice of motion in these proceedings by substituting the wording of the original prayer, with the following:

"(1) The chairpersons of the enquiries instituted against the Applicant are directed to properly consider the Applicant's submission to be legally represented at the enquiries.

(2) To the extent that any proceedings have been held, they are regarded as null and void and of no force and effect."

4. In effect, Applicant sought to alter the nature and status of these proceedings from an application for an interdict brought in terms of section 158(1)(a)(ii) of the LRA, into an application for a review of a decision of a claim of a disciplinary tribunal, presumably in terms of section 158(1)(h) of the LRA.

5.1 There is a long list of cases which establish the principle and support the view that as a general rule, a superior Court will not entertain an application for review, when such review application seeks to interfere with uncompleted proceedings in an inferior Court. *(See Lawrence v Assistant Resident Magistrate, Johannesburg 1908 TS 525; Ginsberg v Additional Magistrate, Cape Town 1933 CPD 357 at 361; Ellis v Visser 1956 (2)SA 117 (W) at 120-1; Sita v Olivier NO 1967 (2) SA 442 (A) at 447 E-F; Haysom v Additional Magistrate, Cape Town 1979 (3) SA 155(C) at 160 B-C; Mendes v Kitching NO 1996 (1)SA 259 (E) at 260 A; Maropane v Gilbeys Distillers (Pty) Ltd 1998 (19) ILJ 635 LC .)*

5.2 This Court may exercise its inherent powers to restrain illegalities in an inferior Court or tribunal, in cases where grave injustice might result, or where justice might not be attained by other means. *(See R v Marais 1959 (1)SA 98 (T) at 101-2; Wahlhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 119; Goncalves v Addisionele Landros, Pretoria 1073 (4) SA 587 (T) at 596 F; Haysom v Additional Magistrate, Cape Town 1979 (3) SA 155 (C) at 160 E; Newell v Cronje 1985 (4) SA 692 (E) at 699D; Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E) at 638 E-G; Mendes v Kitching NO 1996 (1) SA 259 (E) at 269 D-E).*

5.3 Erasmus, (Superior Court Practice Juta & Co 1994 at B1-382) cites the example of a review applicant who can show that if the refusal of a magistrate to recuse himself would cause a miscarriage of justice, he need not wait until the termination of the proceedings before going on review. *[See Newwell v Cronje 1985 (4) SA 692 (E)].*

5.4 In *casu* there is , I believe, no basis for the submission that a grave injustice would occur if the decision of the chairperson of the second disciplinary inquiry, (ie the uncompleted inquiry) was not reviewed at this interlocutory stage. There are a number of different forums open to Applicant to seek justice and to pursue his rights, after the stage of the initial disciplinary enquiry. Accordingly the principles laid down in the references at paragraph 5.2 above (a grave injustice occurring or justice not being able to be attained by other means) are not offended if a review is refused in this matter. Applicant is at liberty to review the decision of the chair of the disciplinary enquiry once those proceedings are finalised, but it is not appropriate that he does so now.

6.1 To the extent that the Respondents have already made a finding of guilt and imposed a fine on Applicant with regard to the other disciplinary enquiry, those proceedings have therefore been finalised, and this Court must now consider whether the failure of the chair of the disciplinary proceedings to independently apply his mind to the question of legal representation, is reviewable or not.

6.2 On the basis of the cases quoted by Counsel for the Applicant, this would seem to be the case. In the case of *IBHAYI CITY COUNCIL V YANTOLO 1991 (3) SA 665 E,* the Court said that if the regulations referred to "representation", without specifying whether this excluded or included legal representation, then one had to look at the current practise. In those particular circumstances, the Court said Applicant was entitled to legal representation at disciplinary enquiry level.

6.3 The Court in the matter of *Dladla & others v Aministrator of Natal & Others 1995 (16) ILJ 1418 NPD* said that while there was a generally recognised convention that legal representation was not allowed at in-house hearings, officials in the public service should not slavishly follow such convention. The Court noted that nothing in the Public Service Act or Staff Code forbade legal representation, and that the appropriate official at an in house hearing had a duty to exercise his discretion as to whether to allow legal representation or not. He had fettered his discretion by treating the convention not to allow legal representation, as a hard and fast rule. The Court held that the failure of the official to exercise his discretion freely and fairly, vitiated the

proceedings.

6.4 Applicant's Counsel argued in the present matter that the Chair of the disciplinary inquiry had allowed his discretion to be totally usurped by the Third Respondent, and that on the basis of Dladla's case, those proceedings ought to be vitiated, and the matter referred back to the Chair for a proper exercise of his discretion concerning the request for legal representation.

7. It is difficult to think of circumstances in which a Presiding Officer of a tribunal could have more roundly failed to exercise this discretion. When the request for legal representation was made, he adjourned the proceedings in order to obtain a directive from his superior, the Third Respondent. Representation was then refused on the basis of the Third Respondent's directive. The presiding officer did not even attempt to apply his mind, exercise his discretion and make an independent decision. On application of the principles in Dladla's case, it is clear that the matter should be referred back to him for a proper decision, and the proceedings in that inquiry be regarded as vitiated *ab initio*, and the finding of guilt and the sanction, the fine of R 6000-00, are set aside.

8. That is the decision of this Court insofar as the completed inquiry is concerned. I shall now deal with the other disciplinary inquiry in respect of which proceedings were suspended, pending the outcome of the decision of the Court with regard to the issue of legal representation. The respective approaches that Applicant, his attorney and respondents may decide to take with regard to the issue of legal representation in the reviewed disciplinary inquiry, may be influenced by what I have to say below.

9.1 It was common cause between Counsel that the critical issue to be decided with regard to the uncompleted inquiry, was the issue of whether the Applicant be permitted to have legal representation.

9.2 I have absolutely no hesitation in saying that he should not be legally represented . There are many

compelling reasons for saying this, and I shall set out some of them below.

9.2.1 There is, as was pointed out in Dladla's case, a general convention that representation by a legal practitioner is not permitted at internal enquiries.

9.2.2 The Supreme Court went further than that in the case of *Cuppan v Cape Display Supply Chain Services 1995 (16) ILJ 846 DCLD,* and held as follows at 847 D-G:

" ...despite the respondent's denial, the parties intended to be contractually bound by the provisions of the respondent's disciplinary code and procedure, including the clause which provided that inquiries had to be conducted 'in accordance with natural justice', and that these provisions had been incorporated in the applicant's contract of employment.

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 to be legally represented at the inquiry must depend upon the terms of the contract itself.

Although there is no general right to legal representation flowing from the requirements of natural justice, in unusually complex cases involving complicated evidence of legal issues, legal representation may be regarded as a *sine qua non* of a fair hearing, and the flexibility of natural justice would seem to accommodate this. The court found however that in this case the inquiry was relatively simple one and did not fall within this exception. It followed, therefore, that the mere inclusion in the respondent's disciplinary procedure of a recognition of the principles of natural justice did not give rise to a right on the part of the applicant to be legally represented at the inquiry. That right had to be specifically conferred upon him by the terms of the contract."

9.2.3 More compelling than this perhaps, is the approach of the LRA itself to the issue of legal representation. Section 40 of the Act prohibits legal representation when the dispute is;

a) about the fairness of the dismissal and

b) the reason for the dismissal relates to the employees conduct or capacity (my underlining).

If this is the approach adopted by the Act with regard to proceedings in the CCMA, *a fortiori,* it must follow that at least a similar, or logically, a far more restrictive approach with regard to internal disciplinary enquiries must be adopted. It would be intolerable if the overly technical and legalistic approach that all too often characterizes the course of legal proceedings when legal practitioners are involved, was to be introduced as a matter of course to internal inquiries. The discipline of employees is an employers' prerogative and is an ongoing and integral aspect of the employer/employee relationship. There is no basis for the view that the informal forums where such discipline takes place, should be burdened by the presence of defence Counsel for the effected employee, or for that matter, prosecuting Counsel for the employer. There can be very little doubt that if legal representation was permitted as a matter of course for effected employees, it would not be long before employers felt that their interests would have to be equally protected by the appointment of a qualified legal practitioner to prosecute the matter. Needless to say, it would follow that the persons chairing disciplinary proceedings, who are normally department heads or Industrial relations officers, would feel out of their depth with both sides being legally represented, and the inevitable consequence would be the appointment of legal practitioners to chair all internal disciplinary inquiries. This would be a preposterous and nonsensical development. The LRA clearly contemplates and makes provision for a hierarchy of decision makers, starting with the chair of the disciplinary inquiry, and ending with the Judges of the Labour Appeal Court. The Act also makes it very clear that as one moves through that hierarchy, so does the nature of the forum become more formal, and the right to legal representation more entrenched (vide section 140). It would be intolerable and inimical to the speedy and efficient resolution of shopfloor disputes to introduce a full blown and formalistic legal inquiry at stage one, and then to have a less formal inquiry, without representation at stage 2 i.e the CCMA arbitration stage.

In *casu,* the presiding officer is a lay person without any legal training. Furthermore, the dispute relates to factual issues, such as whether or not the employee threatened his superior. It would be wholly inappropriate for the employee to be legally represented in such a case. The sorts of people who are called on in industry, commence and government on a daily basis to conduct disciplinary inquiries are Department

Heads, Managers and IR officers. They are not legally trained and they of necessity dispense an informal and robust form of justice which is tolerated within the parameters of our legal system. One of the primary reasons why this is tolerated and indeed tolerable is because the LRA has numerous provisions which allow the disaffected employees to pursue his/her rights further, to the CCMA, Bargaining Council, the Labour Court and the Labour Appeal Court.

10.1 It goes without saying therefore that it is the view of the Court, that
as Didcott J said in Dladla's case that there is a general convention against permitting legal representation.

10.2 Since the passing of the Labour Relations Act, which was after the date of Dladla's case, it can be said that there exists now more than merely a general convention against legal representation. Put differently, such convention is to be applied far more widely and strictly, and that there now exists an overwhelming presumption to the effect that legal representation at disciplinary inquiry level, is to be excluded. Certainly one can say that where the presiding officer and the employer's "prosecuting" officer are lay people, it should never be allowed. Similarly, where the dispute relates to factual issues eg related to an employees conduct or capacity, legal representation should never be permitted.

10.3 It goes without saying that the question of legal representation should only ever arise when and where there is an obvious uncertainty as to whether it is permitted or not. In most cases, the collective agreement or the employer's disciplinary code or similar document, will make it clear that at a disciplinary inquiry, representation shall be by a trade union official, or work colleague. In such circumstances, legal representation should never be permitted.

10.4 However, sometimes the employer's code will say that a "person of his/her choice" is permitted. This must be interpreted as meaning a person who is not a legal practitioner, unless the consistent practice in that enterprise permits legal representation, or unless the dispute involves complex issues of law which call for

legal representation. In this regard, the judgment of Zondo J (as he then was) in the matter of *County Fair Food (Pty)Ltd v CCMA 1990 (20) ILJ 2609* is of application. See also the judgement of Jali A J (as he then was) in *POPCRU V Minister of Correctional Services & Others unreported under case number D511/99.*

10.5 Notwithstanding the complexity of the case, if on a plain reading of the disciplinary code, legal representation is not allowed, then that is where the matter ends.

11. In the case before the Court, at the risk of being repetitive, there is no basis for the view that Applicant should be allowed legal representation and I am surprised that Applicant has gone to these inordinate lengths to attempt to enforce a right which he does not have. The fact that he has been on suspension with full pay for the entire time perhaps explains his persistence in this matter. Certainly he has not made out a case for lrgal representation on the basis of past practise, or on the basis of the complexity of the matter.

12. The inquiry must therefore proceed forthwith and Applicant is not entitled to legal representation.

13. On the basis that, with regard to the completed inquiry. Applicant was successful and with regard to the uncompleted inquiry Respondent was successful, it is fitting that I should make no order as to costs.

Date of hearing: 9 March 2000

Date of judgment: 16 March 2000

Adv. V. Soni

Instructed by Ngwenya and Zwane Attorneys

Adv W.M Mkhize

Instructed by State Attorney (KZN)