Case No 444/88

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE ADMINISTRATOR OF TRANSVAAL	1st Appellant
THE PROVINCIAL SECRETARY (TRANSVAAL PROVINCIAL ADMINISTRATION)	2nd Appellant
THE DIRECTOR OF HOSPITAL SERVICES	3rd Appellant
THE SUPERINTENDENT NATALSPRUIT HOSPITAL	4th Appellant
and	
EVELYN ZENZILE	1st Respondent
MARIA PALE	2nd Respondent
ETHELINA MNGOMAZULU	3rd Respondent

CORAM: HOEXTER, BOTHA, E M GROSSKOPF, MILNE, JJA et NIENABER, AJA

HEARD: 1 March 1990

DELIVERED: 27 September 1990

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

In this appeal the four appellants are respectively the Administrator of the Transvaal, the Provincial Secretary of the Transvaal Provincial Administration, the Director of Hospital Services and the Superintendent of the Natalspruit Hospital. The three respondents were in the employ of the Transvaal Provincial Administration ("the Administration"). They were employed as workers at the Natalspruit Hospital ("the hospital"). During 1987 the respondents were dismissed in circumstances which will be mentioned later. Following upon their dismissal the respondents on notice of motion in the Witwatersrand Local Division sought and obtained against the appellants orders (1) setting aside the decision to dismiss them; (2) declaring that the respondents remain

in the employ of the Administration; (3) directing the appellants to recognise and to give effect to the terms of employment of the respondents; (4) directing the appellants to pay the costs of the application. The application, which was opposed, was heard by COETZEE, J. With leave of the Court below the appellants appeal to this Court.

The respondents are three women. The first respondent is a divorcee. The second and third respondents are widows. The first respondent became an employee of the Administration in April 1972, while the employment of the second and third respondents dates from March 1980 and December 1981 respectively. The first and second respondents were employed as cleaners. The third respondent worked first as a cleaner and thereafter as a ward-aid.

When the respondents began working at the hospital the employment of hospital employees was governed by the provisions of the Hospital Ordinance No 14 of 1958(T). However, with effect from 1 August 1986, and in terms of the Provincial Government Act, 69 of 1986, read with sec 14 of the Public Service Act, 111 of 1984 ("the Act"), the respondents were transferred to the public service. Thereafter the status of the respondents within the public service was that of persons employed temporarily in a full-time capacity within the meaning of sec 7(1)(c) of the Act.

In terms of sec 36 of the Act a code called the Public Service Staff Code ("the Code") has been compiled. Its provisions are binding upon any public service officer or employee. In terms of sec 1 of the Act "officer" means a person who has been permanently appointed and "employee"

means a person contemplated in sec 7(1)(c). Although the Code deals chiefly with officers in the public service, it also contains provisions governing the termination of employment of employees. According to clause 5 of the Code the employment of an employee may be terminated either -

"1. On notice, the minimum notice period being the period for which an employee is paid unless his service contract otherwise provides;

2. Summarily, if the employee has been guilty of misconduct or if his services are unsatisfactory."

The respondents were paid monthly, but the service contracts signed by them when they became employees of the Administration were terminable by 24 hours notice on either

side.

The respondents were members of the Temporary Employees Pension Fund ("the pension fund") established in terms of the Temporary Employees Pension Fund Act 75 of 1979. Membership of the pension fund is dependent on continued employment. A member who is discharged for certain specific reasons mentioned in the pension fund regulations (eg ill-health not occasioned by the member's fault or abolition of the member's post) becomes entitled to the payment of certain benefits from the pension fund. The amount payable depends upon the length of the member's pensionable service. A member with less than 10 years service is paid a gratuity. A member having at least 10 years service receives an annuity. On the other hand a member who has not attained pensionable age and who resigns or is discharged from employment either on account of

misconduct or for a reason not specified in the regulations is paid an amount which is less than the aforesaid gratuity or annuity.

The founding affidavit to the notice of motion was made by the first respondent. The remaining respondents filed supporting affidavits. On behalf of the appellants there were filed a number of opposing affidavits including those of Dr N P Kernes, the acting superintendent of the hospital, Mr J H van Gass, the deputy director of Personnel Management in the hospital services, and Mr J W Olivier, an administrative director in hospital services.

On 18 and 19 August 1987 there took place at the hospital a work-stoppage by a large group of employees. As a result thereof some 130 employees were dismissed. As to the events leading up to and surrounding the dismissals the affidavits filed reflected several disputes of fact between

the rival versions of the respondents on the one hand and the appellants on the other. Inasmuch as the respondents sought final relief the learned Judge in the Court **a quo** had regard to the averments made on behalf of the appellants together with such facts as were common cause.

What precipitated the work-stoppage and the dismissals consequent thereon was the dismissal, nearly a month before, of a Mrs Ntombela. Mrs Ntombela had been a ward-aid at the hospital and the hospital authorities regarded her as a turbulent trouble-maker. Following upon a hearing (at which Mrs Ntombela was present) of certain complaints against her, Mrs Ntombela was dismissed on 22 July 1987. Her dismissal aroused dissatisfaction on the part of other workers at the hospital and they unsuccessfully demanded that Mrs Ntombela be reinstated. Matters came to a head on 18 August 1987. The work-

stoppage began very early on the morning of that day. At 11h15 Mr van Gass instructed Dr Kernes to deliver an ultimatum to the workers involved in the work-stoppage. Shortly after noon Dr Kernes delivered the ultimatum orally to the assembled non-workers. He ordered them to return to work by 13h00 failing which, so he told them, they would face certain consequences. The ultimatum was thereafter reduced to writing in the form of a notice, and copies thereof were made. At 14h00 the notice was read out to the assembled workers and an attempt was made to hand out copies. The workers concerned refused to take the copies.

The notice read as follows:-

"NATALSPRUIT HOSPITAL

NOTICE TO ALL PARTIES INVOLVED IN WORK STOPPAGE AT NATALSPRUIT HOSPITAL ON THE 18/08/1987.

KINDLY NOTE THAT DESPITE BEING REQUESTED TO RETURN TO WORK YOU HAVE IGNORED THIS AND ARE CONSEQUENTLY BOTH DISRUPTING AN ESSENTIAL SERVICE AND ENDANGERING THE PATIENTS' WELL-BEING AS WELL AS BEING IN BREACH OF YOUR CONDITIONS OF EMPLOYMENT.

SHOULD YOU FAIL TO RETURN TO WORK WITHIN 30 MINUTES AFTER RECEIVING THIS NOTIFICATION THE FOLLOWING STEPS WILL BE CONSIDERED BY THE OFFICE OF THE PROVINCIAL SECRETARY IN CONJUNCTION WITH THE DIRECTOR OF HOSPITAL SERVICES.

1. DAILY WORKER (TEMPORARY) - IMMEDIATE DISMISSAL.
2. PERMANENT STAFF
   a) ON PROBATION - REGARDED AS DISMISSED.
   b) NOT ON PROBATION - IMMEDIATE SUSPENSION PENDING CHARGES OF MISCONDUCT

ANY GRIEVANCES THAT YOU FEEL NEED TO BE DISCUSSED CAN BE DONE SO IMMEDIATELY AND ON AN ONGOING BASIS WITH YOUR REPRESENTATIVES ONCE YOU HAVE RETURNED TO WORK.

SIGNED: p.p. DIRECTOR OF HOSPITAL SERVICES
DEPUTY SUPERINTENDENT."

The workers concerned disregarded the ultimatum. They left the hospital grounds at 15h30. At 16h30 Mr van Gass arrived at the hospital and letters of dismissal were drafted and approved. On the morning of 19 August the workers concerned again failed to work. From attendance-registers and clock-cards a list of the workers who had failed to work on the afternoon of 18 August and the morning of 19 August was drawn up. Mr van Gass arrived at the hospital at 11h20 on 19 August and he thereupon signed a letter of dismissal in respect of each of the workers on the list. At 14h20 the letter of dismissal and the names on the list were read to the assembled workers. They were given 30 minutes to collect their letters from an official. Nobody collected the letter. The names of the first two respondents appeared on the list. On 20 August 1987 a copy of the letter of dismissal and/or suspension was sent

by registered post to each affected employee at such employee's last known address. The letter sent to the first and second respondents read as follows:-

> "The TP Administration has been informed that you have failed to perform your normal duties. This action mentioned above constitutes a breach of your conditions of service. You will appreciate that the services rendered by Natalspruit Hospital are of an essential nature. Consequently the Administration cannot allow any act that is prejudicial to the hospital and the efficiency of its administration. As you have failed to resume your duties as instructed by the superintendent or furnished acceptable reasons for your failure to do so, your services must be regarded as terminated with effect from 20 August 1987."

From the affidavits filed on behalf of the appellants it appears that the first and second respondents were summarily dismissed for misconduct in terms of the Code in view of their refusal to work. The position was correctly summarised thus by COETZEE, J in the course of his judgment:-

> "Their contracts of service were liable to be terminated on either 24 hours notice or summary dismissal in the event of misconduct. It is not disputed that the first and second applicants were not given the requisite notice. Mr van Gass who took the decision to dismiss the first and second applicants, does not purport to have given them notice in terms of their service contracts; he contends that he accepted the 'repudiation' thereof by the first and second applicants."

The third respondent was present at the hospital on 19 August 1987. She also refused to work, but due to a mistake her name did not appear on the list; and she was not dismissed on that day. The third respondent was dismissed by a letter dated 7 September 1987 addressed to her last known address. The letter (in terms identical to the letter addressed to the first and second respondents) was not in fact received by the third respondent. The rather involved reasons explaining the delay in her dismissal need not be here recounted. Suffice it to say

that the third respondent was also summarily dismissed for misconduct in terms of the Code by reason of her failure to work.

It is common cause that none of the three respondents was accorded a hearing prior to her summary dismissal. COETZEE, J found that the decision to dismiss the respondents attracted natural justice and that the failure of the appellants to apply the **audi alteram partem** rule ("the **audi** principle") constituted a procedural impropriety vitiating the decision to dismiss them. In reaching the above conclusions the learned Judge was largely guided by the reasoning adopted by GOLDSTONE, J in two recent judgments delivered in the Witwatersrand Local Division : **Langeni & Others v Minister of Health and Welfare & Others** 1988(4) SA 93(W); **Mokoena and Others v Administrator, Transvaal** 1988(4) SA 912(W).

In the **Langeni** case (**supra**) four employees at the hospital had been dismissed on 24 hours notice without a prior hearing. They applied for an order setting aside the decision to dismiss them as being unlawful on the grounds that the decision to terminate their employment was an administrative one and, as such, subject to the rule of natural justice; and, in particular, the **audi** principle. In that case too, the employees were "temporary workers". Their employment was governed partly by statute and regulation, and partly by a contract which provided that it could be terminated by either party on 24 hours notice; or by summary dismissal if in the opinion of the employer the employee had been guilty of misconduct, insubordination or had been absent from the place of work without leave. GOLDSTONE, J held that such was the precarious nature of the employment that the rules of natural justice were

inapplicable. Consequently he dismissed the application. Of larger significance perhaps than the actual outcome of the application in the **Langeni** case is the conclusion to which GOLDSTONE, J was impelled that the public character of the employer in that case brought the decision to dismiss within the compass of administrative law, and rendered it justiciable as such. In view of what follows in this judgment, and having regard to the particular emphasis here placed on the punitive character of the power exercised by the public authority concerned, it is not necessary to express any view as to the correctness or otherwise of the broader approach thus adopted by GOLDSTONE, J in the **Langeni** case.

In the subsequent **Mokoena** case **(supra)** the applicants were also temporary workers employed by the Transvaal Provincial Administration at two provincial

hospitals; and again they were subject to 24 hours notice of their employment. Without giving the applicants a prior hearing the Administration purported to terminate their employment on 24 hours notice; and again the issue was whether they had been entitled to be heard before the decision to dismiss them was taken. The application was opposed. The stance taken by the Administration was that the applicants were merely temporary workers subject to 24 hours notice; and that they were not entitled to be heard before such notice was given to them. For this submission reliance was sought to be placed on the decision in the **Langeni** case. In one respect, however, the facts differed from those of the **Langeni** case. In the **Mokoena** case the applicants had all been employed for a considerable number of years and after some years each had become a compulsory member of the pension scheme and had made contributions

thereto. Concerning this feature of the **Mokoena** case GOLDSTONE, J made the following observations (at 917 B-E):

> "In the passage cited above from the **Langeni** case," (at 101 A-F) "in effect I held that temporary workers, subject to 24 hours' notice of their employment, had no right or legal interest to remain in their employment after the expiration of the notice period of 24 hours. I considered that, even if the legitimate interest test was applied, they also could not have been held to have had such expectation as to the continuation of their employment, whether or not there were good reasons for termination. I have no doubt that the compulsory Pension Fund of which the applicants became members after two or five years' employment, as the case may have been, placed them in a completely different category. They were obliged to make the monthly payments and so pay for a right to a pension upon retirement.
>
> A condition of their entitlement to that pension is their remaining in that employment until reaching the age of 60 years. It will be cold comfort to Mrs Mokoena, for example, who has made payment for some 15 years, to receive back her contributions together with interest at a rate not disclosed on the papers, but unlikely to be very attractive."

Later in the same judgment (at 918 A-B) the learned Judge concluded:-

> "In the present case the administrative authority to give 24 hours' notice to the applicants clearly affects their pension rights and involves legal consequences to them. That is sufficient to have entitled them to have been heard before such action was taken against them and the official concerned would have been obliged to give honest and **bona fide** consideration to any such representations made by them. Failure to have done so would have vitiated such a decision.
>
> It thus becomes strictly unnecessary to reconsider the applicability in our law of the legitimate expectation test. However, if I am incorrect that the decision to terminate the employment of the applicants is a decision affecting their rights or involving legal consequences to them, then I have equally no doubt that they did have a legitimate expectation that they would not be deprived of their right to qualify for a pension without good or sufficient cause. That legitimate expectation would have entitled them to a hearing before the decision to terminate their employment was made by the official having the power to do so.

> In passing, I would draw attention to my understanding that the legitimate expectation refers to the rights sought to be taken away and not to the right to a hearing ....."

In argument before this Court counsel for the appellants urged upon us that the **Mokoena** case had been wrongly decided. For purposes of this appeal it is not necessary, so I consider, to decide whether the **Mokoena** case was correctly decided. The **Mokoena** case dealt with the position of employees dismissed on notice. In the instant case one is concerned with employees summarily dismissed on the grounds of alleged misconduct. The power exercised by the employer against the employees is one of a disciplinary or punitive nature. That was also the position in an application made by certain employees ("the applicants") to the Orange Free State Provincial Division ("the OPD") in **Mokopanele v Administrateur, Oranje Vrystaat** 1989(1) SA 434, which later came on appeal to this

Court.

In the **Mokopanele** case the applicants had been employed by the Orange Free State Provincial Administration ("the employer") as hospital cleaners; and they were also members of the pension fund. Together with other employees the applicants participated in a work-stoppage on 25 and 26 August 1987. An assistant director in the Public Service, who was authorised to negotiate with the striking employees informed them on 26 August that if they failed to return to work on the following day they would be dismissed. On 27 August the applicants returned to work. On 17 September the applicants were nonetheless summarily dismissed on the grounds of alleged misconduct in terms of clause 5(2) of the Code. Prior to such dismissal the employer had not afforded the applicants a hearing. In their application to the OPD the applicants sought an order declaring their

purported dismissal to have been unlawful and setting it aside. Their application, which was opposed, succeeded. The learned judge (VAN COLLER, J) rounded off a comprehensive judgment by remarking (at 444G):-

> "Ek kom dus tot die gevolgtrekking dat die applikante 'n geleentheid moes gehad het om hul saak te stel en dat hul ontslag as gevolg daarvan dat hul nie sodanige geleentheid gegee is nie ongeldig is."

Earlier in his judgment (at 443A-C) the learned Judge had alluded to the fact that through the ultimatum issued to the applicants on 26 August, whose terms were met when the applicants resumed work on 27 August, the employer might have exercised an election not to dismiss the applicants and accordingly that:-

> "....die ontslag van die applikante op grond hiervan ook moontlik onregmatig was...."

The employer appealed to this Court against the judgment of the OPD. On appeal (see **Administrator, Orange Free State v mokopanele** 1990(3) SA 780 (A)) the decision of the OPD was confirmed, but for different reasons. The **ratio** of this

Court's judgment was that the ultimatum to the striking workers had been a clear intimation to the strikers that, if they resumed work on the following day, the employer would waive its right of dismissal; that a contracting party who had once approbated could not reprobate; and that in the light of the events of the hospital on 26 and 27 August the employer had not been legally entitled to change its mind as it had sought to do when it had purported to dismiss the applicants on 17 September 1987.

For purposes of the present appeal it is necessary to decide whether in the **Mokopanele** case the OPD correctly concluded that the **audi** principle was applicable to the facts of that case. The remarks of the learned Judge in rejecting the argument on behalf of the employer that there was no room for the application of the **audi** principle are, I think, instructive. At 440G - 441H VAN COLLER, J said the following:-

"Mnr **Van Coppenhagen** het .....aangevoer dat die **audi alteram partem**-reël nie hier van toepassing is nie aangesien daar nie ingegryp is of inbreuk gemaak is op 'n voorafgaande en verworwe subjektiewe reg nie. Volgens sy argument het die applikante nie die reg gehad om aanspraak te maak om nadat hulle in diens getree het in diens te bly nie. Die vraag of applikante onregmatiglik ontslaan is al dan nie is gevolglik nie afhanklik van die nakoming van die **audi alteram partem**-beginsel nie. Ek kan nie met mnr **Van Coppenhagen** se argument akkoord gaan nie. Ek dink nie daar kan twyfel wees dat indien enige werknemer ontslaan word van sy regte aangetas word nie. Waar 'n werknemer se dienste ingevolge klousule 5(1) van die kode beëindig word, kan dit, so kom dit voor, nie onregmatiglik geskied nie wat die oorwegings ookal mag wees. Daar kan in so 'n geval (indien die werknemer se regte tot sy pensioen buite rekening gelaat word) ook nie 'n aantasting van regte wees in die sin van 'n aanspraak om in diens te bly nie. Vergelyk wat in dié verband gesê is in die ongerapporteerde beslissing in **Langeni and Others v Minister of Health and Welfare and Others** .....

By 'n summiere ontslag ingevolge klousule 5(2) van die kode is die posisie egter heeltemal anders. Hier kan daar eerstens sprake wees van 'n onregmatige ontslag, byvoorbeeld waar die werknemer hom inderdaad nie skuldig gemaak het aan wangedrag of onbevredigende dienslewering nie. Dit sal ook opgelet word dat hier nie

sprake is van optrede wat na die oordeel van die Administrateur wangedrag of onbevredigende diens uitmaak nie. Dit is moeilik om in te sien hoe 'n ontslag ingevolge die bepalings van klousule 5(2) nie 'n werknemer se regte kan aantas nie. Vergelyk in hierdie verband : **Tshabalala and Others v Minister of Health and Others** 1987(1) SA 513 (W) op 519 en 520; **Mayekiso v Minister of Health and Welfare and Others** (1988) 9 ILJ 227 (W) op 230 B-C; en **Myburgh v Daniëlskuil Munisipaliteit** 1985(3) SA 335 (NK) op 342-4. Selfs waar daar inderdaad wangedrag en onbevredigende diens was, het die Administrateur nog 'n diskresie om te ontslaan al dan nie en in so 'n geval vereis die reg nogtans dat die reëls van natuurlike geregtigheid nagekom moet word. Vergelyk in hierdie verband die ongerapporteerde beslissing in die saak van **Traub and Others v Administrator of the Transvaal and Others,** Witwatersrandse Plaaslike Afdeling..... Nie-nakoming van die reëls van natuurlike geregtigheid kan die grondslag wees van 'n werknemer se onregmatige ontslag en die argument dat die vraag of applikante onregmatig ontslaan is al dan nie, nie afhanklik is van die nakoming of nie-nakoming van die **audi alteram partem**-beginsel is na my mening nie korrek nie. Mnr **Van Coppenhagen** het veral gesteun op die Appèlhofbeslissing in **Le Roux v Minister van Bantoe-Administrasie en -Ontwikkeling** 1966(1) SA 481(A). Soos blyk uit die uitspraak, het dit in daardie saak gegaan oor die ontslag van 'n amptenaar deur 'n munisipaliteit. Die ontslag

> was volgens die tersaaklike statutêre bepalings onderhewig aan die toestemming van die Minister van Bantoe-administrasie. Wat beslis moes word is of die Minister die amptenaar moes aangehoor het alvorens hy sy toestemming tot die ontslag gegee het. Die Appèlhof het beslis dat die uitoefening deur die Minister van sy bevoegdhede ingevolge die betrokke artikel nie die amptenaar se regte aantas nie. Die Minister het nie die bevoegdheid gehad om die amptenaar te ontslaan nie. Die munisipaliteit het wel die bevoegdheid gehad. Dit het dus nie pertinent gegaan oor die regte wat moontlik aangetas kon gewees het deur die optrede van die munisipaliteit nie. Die onderhawige saak is dus te onderskei van die **Le Roux**-saak en die beslissing in gemelde saak is na my mening nie gesag vir mnr **Van Coppenhagen** se argument nie."

I respectfully agree with the view expressed by VAN COLLER, J that the decision in the **Le Roux** case lends no support to the argument on behalf of the employer in the **Mokopanele** case. A brief recapitulation of the facts and issues in the **Le Roux** case, together with a few comments on the line of reasoning therein adopted by this Court may, however, serve to clear the way for a discussion of the

principle involved in the present appeal.

The **Le Roux** case turned on a statutory provision governing the terms and tenure of office of certain officials appointed for the management of locations. The statutory provision applied to **inter alios** the director of Black Administration employed by the Paarl Municipality. The effect of the provision was that the director could not be removed from office by the municipality unless the Minister notified his approval; but the municipality might suspend him from office for incapacity, neglect or misconduct, pending notification of Ministerial approval, which, if given, would result in removal from office being deemed to date from the time of suspension. The municipality so suspended the director, the Minister notified his approval, and thereafter the director sued the municipality and the Minister for damages for unlawful

dismissal. He averred that he had not been informed by either defendant of any complaint against him, and that he had not been given an opportunity of controverting any unfavourable allegations that might have been made against him. The Minister excepted to the declaration as disclosing no cause of action. The exception succeeded in the Court **a quo** on the ground that the **audi** principle was inapplicable. On appeal this Court held that in general the **audi** principle is applied only where there is assigned to a statutory functionary the power to give a decision which affects the rights of another. In delivering the judgment of the Court BEYERS, ACJ remarked (at 491 C-F) that in the particular case the director had been dismissed either lawfully or unlawfully by the municipality. If lawfully, then he had no rights against the municipality which could be affected by the Minister's approval of the dismissal. He had at most a **spes** that the Minister might

decline to approve the dismissal. If the Minister approved it no prejudicial consequences followed because the law simply took its course. On the other hand if the dismissal had been unlawful, again the Minister's approval had had no effect on the director's rights. He retained the right to sue the municipality for unlawful dismissal.

The issue before this Court in the **Le Roux** case was whether an exception raised by the Minister was well-founded. The question whether the municipality's dismissal could be impugned for its failure to apply the **audi** principle was neither raised nor considered. Accordingly the **Le Roux** case is hardly material to the issue in the present appeal. Apart from this it appears to me, with due deference, that in the future this Court may well have to appraise anew the correctness of the **ratio** in the **Le Roux** judgment. There is, in my respectful view,

cogency in the criticism levelled at the reasoning in the **Le Roux** judgment by Wiechers **THRHR** (1966) vol 29 at 157 - 159. At 158-9 the learned author makes the following trenchant observations:-

> "Die regter se bevinding dat applikant se ontslag nie sy regte getref het nie, is met respek geheel en al onverstaanbaar. **Prima facie** word enige persoon wat uit sy werk ontslaan word, se regte aangetas. (Sien die Hof - ook by monde van appèlregter Beyers - in die saak van **Minister van Naturellesake v Monnakgotla**, 1959(3) SA 517 (A) op bl 521: 'In die onderhawige geval skyn daar geen twyfel te wees dat die appellant nadelig beïnvloed word deur die Minister se bevel nie. Sy status in sy gemeenskap sowel as sy vermoënsregtelike posisie word ongetwyfeld deur sy afsitting benadeel').
>
> Hierdie aantasting van belange hoef egter nie altyd onregmatig te wees nie. As die reg die aantasting toelaat, is dit nie onregmatig en kan 'n persoon hom nie daaroor bekla nie selfs al ly hy skade (of suiwerder gestel : 'n geoorloofde aantasting van belange is nie 'n regsaantasting nie omdat 'n subjektiewe reg alleen sover strek as wat die reg sy beskerming daaraan verleen). Een van die voorwaardes waarop die reg aantasting van

> 'n onderdaan se belange toelaat, is dat 'n owerheidsorgaan by die uitoefening van die diskresie of hy daardie belange sal aantas, die reëls van natuurlike regverdigheid moet nakom. Word die reëls van natuurlike regverdigheid nie nagekom nie, is die aantasting onregmatig en behoort die onderdaan, as hy skade kan bewys, op vergoeding aanspraak te kan maak. (Sien **Mgwenya v Nelspruit Bantu School Board**, 1965(1) SA 692 (W)). Wat die Hof in hierdie saak in der waarheid bewerkstellig het, is om die eiser by voorbaat te verhoed om onregmatige optrede aan die kant van die Minister te bewys."

Against the backdrop of the reported cases explored above I return to the issues in the present appeal. The main argument advanced on behalf of the appellants was that the facts were such as to place the matter entirely beyond the reach of administrative law. In the alternative it was contended that, in any case, upon a true construction of the Act it was evident that the Legislature had intended to exclude the operation of the **audi** principle and to deprive temporary workers (as opposed to officials) of the fundamental right to a prior hearing

before their summary dismissal for misconduct.

The burden of the main argument was that in the present appeal the contractual relationship between the Administration and the respondents was simply one of master and servant governed exclusively by the common law of contract; and that the respondents' participation in the work-stoppage amounted to an unlawful repudiation of their contractual obligation to work, or at any rate to a fundamental breach of that obligation, which entitled their employer summarily to dismiss them. In these circumstances, so it was said, the decision to dismiss fell entirely beyond the purview of administrative law, and the rules of natural justice did not come into the case at all. I am unable to accept that argument. One is here concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which invests

the employee with a particular status which the law will protect. Here the employer and decisionmaker is a public authority whose decision to dismiss involves the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct. Where an employee has this protection legal remedies are available to him to quash a dismissal not carried out in accordance with the principles of natural justice. It appears to me that in the present case it is the specific protection accorded to a member of the public service which must prevail. Despite the humble posts occupied by the respondents in the public service hierarchy it is significant, I consider, that neither the Act nor the Code distinguishes between "permanent employees" on the one hand and "temporary

employees" on the other. The distinction made in the Act and the Code is between "officers" on the one hand and "employees" on the other.

Sec 36 of the Act gives statutory effect to the provisions of the Code. The provisions of the Code are incorporated by reference and they apply, no less than the provisions of the Act itself, to all contracts of service between the Administration and officers or employees. Sec 36(3) of the Act refers to a "department". In terms of the definition in sec 1, read with sec 6(1) and Schedule 1, this includes the Administration. In consequence every condition or term of employment prescribed in the Code as governing any contract of service between the Administration and an officer or employee is statutorily injected into the contractual relationship between the parties. The parties cannot contract out of the statutory provisions imported by the Code. The Code enjoys

paramountcy. If, for example, a contract of service between the Administration and an employee provides for dismissal on one month's notice but the Code were to prescribe a minimum notice of six months, the employee could legally insist upon the latter notice as a right conferred upon him by statute.

Moreover, in the context of the problem under discussion, there must not be overlooked what is an elementary rule of our law of contract : that a breach which justifies rescission does not automatically determine the contract. It merely gives the injured party the option either to rescind it or to affirm it and claim further performance. Here the Administration's election summarily to dismiss the respondents could be lawfully exercised only if the respondents had been guilty of misconduct or had rendered unsatisfactory service. The Administration was not entitled to exercise an arbitrary or

capricious discretion. It had a legal duty to inquire into matters of fact and law. When a statute empowers a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken unless the statute expressly or by implication indicates the contrary. (See **Administrator, Transvaal, and Others v Traub and Others** 1989(4) SA 731(A) at 748G and the decisions cited at 748 E-F). In the instant case the decision summarily to dismiss did affect the respondents prejudicially in their rights.

It seems to me that **ex hypothesi** a contract of service which is governed in part by statutory provisions cannot properly be described as a "pure" or "ordinary" contract of master and servant; an officer or employee under such a contract cannot appropriately be called an "ordinary" servant; and the rights and obligations of the

parties cannot legitimately be said to arise out of "purely contractual relations."

Counsel for the appellants sought to place reliance on the decision of this Court in **Monckten v British South Africa Co** 1920 AD 324. It seems to me that in resolving the issue presented in the instant case **Monckten's** case is clearly distinguishable. I have already pointed out that in the present case the power exercised by the Administration against the respondents is of a disciplinary or punitive nature. That is the central fact of this case which distinguishes it from **Monckten's** case. In **Monckten's** case the trial Court found that although the plaintiff was a member of the Rhodesian Civil Service and was therefore subject to the disciplinary regulations affecting such members, he had in fact not been punished under the regulations. Dealing with the trial Court's finding that the plaintiff had been subject to

disciplinary regulations of the Civil Service, INNES, CJ observed at 329:-

> "Regarding the matter in the light of that finding it is clear that if it was considered necessary to charge him with any official misconduct, the offence should have been communicated to him in writing and he should have had the opportunity of submitting a written reply."

Later in his judgment (at 330) the learned Chief Justice summarised the essential facts thus:-

> "In spite of certain expressions in the correspondence, the steps taken do not fall under any of the heads of punishment set out in the regulations. And clearly the Administrator neither purported nor intended to inflict punishment under them: for at the time it was considered that the regulations did not apply."

There is, I apprehend, no reason in principle why a statute relating to contracts should be approached otherwise than a statute dealing with some other subject-matter. The nature of the subject-matter may bear upon

the second limb of the inquiry ("unless the statute expressly or by implication indicates the contrary"); but it cannot by itself bar the door to the anterior inquiry.

In my view it is logically unsound and wrong in principle to postulate that the **audi** principle has no application to "purely contractual relations"; from that premise to embark upon an inquiry as to whether or not there is something in the legislation which imports the **audi** principle into the contractual relationship; and to require that the statute concerned should incorporate the **audi** principle, either expressly or implicitly. It seems to me that so to approach the problem is to put the cart before the horse. The existence of a contractual relationship cannot alter the essential nature of the inquiry. With reference to any particular provision of a statute (in this case the Code), the questions to be answered are, as always: (i) Is a public official

empowered to give a decision affecting the existing rights of an individual? And, if so, (ii) Is the right of the individual to be heard before the decision is taken excluded either expressly or impliedly?

If the above approach correctly reflects the position in our own law, an analysis of the English reported cases and a consideration of the **dicta** therein may be instructive, but these can hardly be conclusive of the issue in the present appeal. In passing I would venture the view that English law on the topic under discussion appears to be characterised by more than a little casuistry. **Craig, Administrative Law,** 2nd ed (1989) in discussing the availability of natural justice in England in the area of employment remarks (at 225):-

> "The incidence of procedural protection in this area is less than satisfactory. Distinctions are drawn which when examined have little to recommend them. First, the line between what is regarded as an office and what is construed as a

> pure master-servant relationship can be very fine, thereby rendering the applicability of natural justice difficult to predict and producing divisions which are capricious. Secondly, the line between officers dismissable for cause and those dismissable at pleasure can also be hard to draw."

I would add, however, that the opinion of the Privy Council in **Vidyodaya University of Ceylon and Others v Silva** (1964) 3 All ER 865 (PC) which was strongly relied upon by counsel for the appellants (and more particularly the passage at 875D) may be explicable in terms of our law on the basis that the **audi** principle was impliedly excluded by virtue of the fact that the statute in question dealt with a private employer and its employee. I would further add that in so far as the judgment of the Privy Council may signify that in general the "statutory flavour" of a contract of service is of no consequence, I am quite unable to assent to such a proposition.

Applying the above approach to the facts of the

present case one then has the situation in which the respondents were summarily dismissed for misconduct by the decision of public officials representing the Administration who were empowered to do so by the provisions of the Code. The exercise of a statutory power to dismiss is not deprived of its intrinsic jural character simply because a corresponding right to dismiss exists at common law or that provision for it may be made in a contract. The common law or contractual right gains an added dimension and is invested with special significance by its express enactment in a statute. This consequence cannot be ignored; and it lays the foundation for the classic formulation of the audi rule.

One is here concerned with two separate and logically discrete inquiries. The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes

of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when, as here, the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant. Mureinik, 1985(1) **SAJHR** 48, points out (at 50) that:-

> "...perhaps pre-eminent amongst the qualities of a power that attract natural justice is its susceptibility to be characterized as 'disciplinary' or 'punitive'.

The learned author explains that the reasons for this are rooted both in history and in principle; but that the latter are crucial. At 50/51 he summarises the reasons of principle thus:-

> "Where the power is disciplinary, all the usual reasons for importing natural justice generally apply, and generally apply with more than the usual vigour : the gravity of the consequences for the individual, consequences both concrete and such as affect his reputation; the invasion of the individual's rights; that fairness postulates inquiry; and so on. But more than

> this, there is a reason of principle peculiar to disciplinary or punitive proceedings : that even if the offence cannot be disputed, there is almost always something that can be said about sentence. And if there is something that can be said about it, there is something that should be heard....."

It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade, **Administrative Law** (6th ed) puts the matter thus at 533-534:-

> "Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly."

The learned author goes on to cite the well-known dictum of MEGARRY, J in **John v Rees** (1970) Ch 345 at 402:-

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with

> examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

It is unnecessary, I think, to dwell at any length upon the appellants' alternative argument based upon the construction of the Act itself. Nowhere in the Act is it expressly stated that members of the public service who are temporary employees are not entitled to a hearing before a decision to dismiss them is taken. Can it be said that such an intention on the part of Parliament is to be gleaned as a matter of necessary implication? In this connection counsel for the appellants were constrained to seek aid in that last refuge, the maxim **unius inclusio est alterius exclusio.** It is not a rigid rule of statutory construction (see **Chotobhai v Union Government and Another** 1911 AD 13 at 28); and it must at all times be applied with

great caution (see **S A Estates and Finance Corporation Ltd v Commissioner for Inland Revenue** 1927 AD 230 at 236; **Consolidated Diamond Mines v Administrator, SWA** 1958(4) SA 572 (A) at 648 G/H.)

Now it is true that permanent members of the public service are favoured by a great number of procedural devices prescribed in the Act. These statutory procedures afford officers in the public service a protection significantly greater than that accorded to employees at common law. Sec 19 of the Act sets forth an elaborate definition of what constitutes misconduct in the case of an officer. Sec 20 contains detailed and extensive procedural provisions governing the making of a charge of misconduct against an officer; the admission or denial of such a charge by an officer; the appointment of a person to inquire into the charge; the evidentiary rules applicable to proceedings at such an inquiry; the

officer's right to legal representation thereat, and so forth. It is also true that the Act is entirely silent as to what procedure is to govern the making of a charge against an employee as contemplated by sec 7(1)(c); and as to the employee's rights subsequent thereto.

Looking at the tenor of the Act as a whole, I consider that the maxim **unius inclusio est alterius exclusio** cannot usefully be invoked in support of the implication for which the appellants contend. Its application would have an extraordinary and unjust result. In this connection I think that the following argument advanced on behalf of the respondents is sound. Their counsel pointed out that although the Act, in the respects indicated, gives to officers rights far exceeding the natural justice requirements recognised by the common law, the Act's silence as to the position of employees hardly warrants an inference that it was the intention of the

legislature completely to divest employees of their common law rights.

Counsel for the appellants sought to rely on the decision by this Court in **Moodley and Others v Minister of Education and Culture, House of Delegates, and Another** 1989(3) SA 221(A). The appellants in that case were young teachers employed either on probation or in temporary positions, whose employment had been terminated on notice. In the **Moodley** case (**supra**) this Court concluded (at 235 C-H and at 236 C-D) that by the legislation there under consideration the legislature had intended to deprive teachers in the position of the appellants of a right to be heard before termination of their employment on notice. In the present appeal the question is whether the legislature intended to deprive employees of their common law right to be heard prior to summary dismissal. In my opinion the **Moodley** case is clearly to be distinguished

from the present one; and it does not assist the appellants. The first feature of the legislation relevant to the **Moodley** case which prompted both the Court of first instance and this Court to conclude that the principles of natural justice did not require the Department concerned to give the probationary and temporary teachers a hearing before terminating their services, was that the Minister's decision to terminate the services of the teachers concerned derived from the exercise of a discretion which "does not hinge upon an inquiry into or a consideration of facts or circumstances in regard to which there may be a conflict; or upon any particular finding of fact" (235 C-D). In the present case, on the other hand, the Administration is entitled to dismiss only if the employee has been guilty of misconduct or unsatisfactory service. The exercise of the discretion involved clearly hinges upon an inquiry into and a consideration of facts and

circumstances in regard to which there may be a conflict. The fourth feature (235G) was that the "manifest object of a system of teachers on probation is to provide a convenient testing period and at the same time to ensure that, if for any reason the probationer does not prove suitable, his probation may be terminated speedily and in an uncomplicated fashion." In the present case the respondents were in no sense employed on a probationary basis.

For all the aforegoing reasons it seems to me that in the **Mokopanele** case (**supra**) the OPD correctly concluded that the **audi** principle was applicable to the facts of that case; and, similarly, that in the present matter COETZEE,J was right in holding that the failure of the appellants to apply the **audi** principle constituted a procedural impropriety vitiating the decision summarily dismissing the respondents for alleged misconduct.

In reaching their respective conclusions both VAN COLLER, J in the **Mokopanele** case (at 442B - 443B) and COETZEE, J in the Court below approved and adopted the reasoning in the **Mokoena** case (**supra**). In the **Mokoena** case GOLDSTONE, J held (at 917 B - E) that the fact that the applicants in that case were members of a compulsory pension fund placed them "in a completely different category" from the applicants in the earlier **Langeni** case (**supra**). GOLDSTONE, J held (at 918 A -B) that the **audi** principle was applicable in the **Mokoena** case because the notice to dismiss the applicants affected their pension rights. In the instant case too the respondents were members of the pension fund. I wish to make it plain, however, that in reaching the conclusion that the **audi** principle should have been applied in the present matter I find it unnecessary to rely at all on the respondents' membership of the pension fund. It seems to me that in

the case of summary dismissal for misconduct membership or non-membership of a pension fund is immaterial to the principle involved. In so saying I do not wish to suggest that membership of a pension fund may not have relevance in employment cases involving dismissal on notice and in which the circumstances are so special that the doctrine of legitimate expectation may successfully be invoked. The nature, scope and limits of the doctrine of legitimate expectation are explored in the judgment of this Court in **Administrator, Transvaal, and Others v Traub and Others** (supra). In **Traub's** case this Court accepted that, in certain circumstances, the dictates of fairness require that a public body or a public official should afford a person a hearing before taking a decision concerning him although the decision has no effect on such person's existing rights.

The issue in the present case has been resolved

in favour of the respondent without any reliance upon the doctrine of legitimate expectation. In passing, however, I would make brief reference to the following. In regard to the doctrine of legitimate expectation GOLDSTONE, J in **Mokoena's** case stated (at 918D) that on his understanding of the position:-

> ".....the legitimate expectation refers to **the rights sought to be taken away** and **not the right to a** hearing." (Emphasis supplied).

In **Traub's** case, however, in delivering the unanimous judgment of the Court, CORBETT, CJ expressed (at 758F) the opposite view. This Court's affirmation that the doctrine of legitimate expectation relates to the right to a hearing rather than to the rights sought to be taken away seems to be susceptible of a possible implication that even in employment cases involving an employee whose tenure is precarious it may be open to a dismissed employee, in the very special circumstances of a particular case, to invoke

the doctrine of legitimate expectation if his employer is a public body.

One last matter should be stressed. In the instant case the appellants were content to rest their case on the proposition that the respondents had no right at all to be heard. That was the sole issue. It was no part of the appellants' case that in the situation obtaining at the hospital during the work-stoppage it would have been very difficult to give the respondents a hearing. In consequence this Court is relieved of the duty of trying to define what form of hearing would have satisfied the fundamental principles of fairness. A few general observations, however, may not be out of place.

The **audi** principle is a flexible one. As pointed out by Corder, **The content of the audi alteram partem rule in South African administrative law, THRHR** vol 43 (1980) 156 at 157 -

> "....the content of the rule more often than not depends upon the scope of its operation."

In a particular situation it may not be possible to accord fully to an affected person his right to be heard. The thesis that from this fact it should be inferred that the relevant statutory enactment intended no right of hearing at all, was rejected by this Court in **Attorney-General, Eastern Cape v Blom and Others (supra)** at 665A-666B. Nevertheless the inherent constraints imposed by a particular situation may require some attenuation of the affected person's right to be heard - see **Blom's** case **(supra)** at 669H-I. In the present case the extent of the disruption in the functioning of the hospital resulting from the work-stoppage and the necessity for prompt action on the part of the Administration appear sufficiently from the following passage in the affidavit of Dr Kernes:-

> "I want to emphasise that the services of the applicants and other workers who participated in

> the work stoppage consisted inter alia of cleaning wards, theatres, laundry, changing linen and preparation and distribution of food to patients. These services are of an essential nature and had to be rendered on an ongoing basis."

Suffice it to say that in the circumstances of the present case the crisis at the hospital precipitated by the work-stoppage was of such a nature that a very appreciable attenuation of the right to be heard might well have been inevitable.

The appeal is dismissed with costs, such costs to include the costs of two counsel.

G G HOEXTER, JA

BOTHA, JA)
E M GROSSKOPF, JA) Concur
MILNE, JA)
NIENABER, AJA)