116/92

Case No 100/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ADMINISTRATOR OF NATAL	1st	Appellant
DIRECTOR-GENERAL, NATAL PROVINCIAL ADMINISTRATION	2nd	Appellant

and

SAKHAYEDWA AMBROSE SIBIYA	1st	Respondent
FUMANEKILE MTSHIYWA	2nd	Respondent

CORAM: HOEXTER, E M GROSSKOPF, NESTADT, GOLDSTONE JJA et HARMS AJA

HEARD: 25 May 1992

DELIVERED: 20 August 1992

J U D G M E N T

HOEXTER, JA .....

HOEXTER JA,

The two respondents were employed by the Natal Provincial Administration ("the NPA"). Their employment was governed by the Public Service Act, No 111 of 1984 ("the Act") and the Public Service Staff Code ("the Code") promulgated under the Act. Each respondent was an employee employed temporarily in a full-time capacity, his contract of service being terminable on notice of one month.

The respondents were members of a large work-force engaged upon the building of hostels at Glebe in the Durban area ("the project"). The project was funded by the National Housing Fund. Due to a shortage of money, and upon instructions from the central government, the project was abandoned in 1990. As a result 29 members of the work-force, including the respondents, became redundant and the NPA decided that they should be retrenched. The

respondents were given the requisite one month's notice and their employment ended on 31 December 1990. Neither respondent was given a hearing at any stage by the appellants.

In the Durban and Coast Local Division the respondents obtained a **rule nisi** calling upon the appellants to show cause why their dismissals should not be declared invalid. On the return day the application was resisted by the appellants. The matter came before **Didcott J.** The sole issue argued before him, which counsel agreed was decisive of the case, was whether the NPA could lawfully dismiss the respondents without having observed the **audi alteram partem** rule by giving them a hearing and an opportunity to make representations with regard to their dismissals. In due course **Didcott J** delivered a judgment in which the **rule nisi** was confirmed with costs, including the costs of two counsel. The

judgment of the court a quo has been reported sv Sibiya and Another v Administrator, Natal, and Another 1991(2) SA 591 (D). With leave of the court below the appellants appeal to this court against the whole of the judgment of Didcott J.

At the time of the application the circumstances of each of the respondents were as follows. The first respondent, aged 54 years, occupied the position of "foreman general", and he had been employed by the NPA for ten years, during which period he had received regular salary increases. His gross monthly salary at the time of the termination of his employment was R1 077,25. He was a married man and his wife and eight children were dependent upon him. The first respondent was a member of the Temporary Employees Pension Fund; the second respondent was not. The second respondent, who had been in the employment of the NPA since March 1989, was 21 years old

and unmarried. His monthly salary was R530. Both respondents were members of the Natal Provincial Administration Staff Association ("NPASA").

The second appellant is the Director-General of the NPA ("the D-G"). On 5 December 1990 NPASA wrote a letter to the D-G in connection with the termination of the employment of a number of its members who had lost their employment at Glebe. NPASA voiced concern thereat and requested an urgent meeting with the D-G's office "to discuss the matter". Mr J A Creeke ("Creeke") is a Deputy Director (Personnel Management) in the NPA. By letter dated 6 December 1990 Creeke responded to NPASA's request for a meeting. While recording his appreciation of the concern shown by NPASA Creeke intimated that the proposed meeting would serve no purpose. Creeke's letter stated, **inter alia**:-

> "Before the decision was taken to serve notice of termination of services, the Community Services

> Branch made all reasonable attempts to absorb the employees concerned in other posts. Their dismissals were not considered lightly - quite the contrary. However, if alternative employment is not available and if funds are exhausted, one cannot reasonably argue that the Administration has been unfair."

A Durban firm of attorneys, Yunus Mahomed & Associates ("M & A"), acting on behalf of NPASA, wrote a letter to the D-G on 12 December 1990. This letter expressed concern at "the manner in which the matter has been handled by your Administration" including the fact that the decision to effect retrenchment had been taken without consultation with either the employees concerned or NPASA. In this connection the following was said:-

> "In failing to take this essential step your Administration missed a valuable opportunity to inform itself of what was fair and reasonable in the circumstances."

M & A's letter further invited answers by the NPA to seven different questions, the last of which was couched thus:-

> "(vii) Was the decision maker aware of the

> provisions relating to the treatment of personnel in case of termination, reduction or alienation of state activities? (We are here referring to the circular dated 21 July 1987 and sent out to all Departments and Administrations by the Secretary: Commissioner for Administration.)"

On the same date the questions posed by M & A were promptly answered in writing by Creeke. His response to the seventh question was recorded thus:-

"(vii) Not relevant."

Appended to the first respondent's founding affidavit there is a copy of the circular by the Commission for Administration ("the circular") to which reference was made in M & A's letter to the D-G. The circular sets forth guidelines for the treatment of personnel involved in activities about to be "terminated, reduced or alienated." Under the heading "General Policy" it says that in all such situations "the point of view is that .... the dismissal of personnel should be avoided where possible." The circular

goes on to state that where dismissal appears to be unavoidable it should be handled in the manner calculated to achieve "the greatest degree of acceptability"; and that "The State as employer undertakes to treat all personnel in a fair and reasonable manner." In the concluding paragraph of the circular the Commission for Administration calls upon departments to -

> "(a) bring the content of this circular to the attention of all members of management, as well as the staff who stand to be affected by the termination, reduction or alienation of activities; and
>
> (b) to assure those concerned that every situation will be handled with circumspection and that all actions will be aimed at fairness and reasonableness."

In opposition to the application a number of answering affidavits were filed on behalf of the appellants. The deponent to the main answering affidavit was Creeke. In the course of his affidavit Creeke

explained that the list of staff to be retrenched had been drawn up by the site clerk at Glebe and the artisan superintendent in consultation with the regional engineer in the Directorate of Community Services. In compiling the list of 29 names:-

> "....the so-called LIFO principle (last in first out) was strictly applied with one exception, namely, certain qualified employees with less years of service were retained in preference to unqualified employees with longer service."

Creeke went on to say that every effort had been made to act fairly in the matter by attempting to place the respondents in employment elsewhere; and, when this proved impossible, by terminating their services with due regard to qualifications and periods of service.

Creeke denied that there was any obligation upon the appellants to afford the respondents a hearing. To this he added:-

> "All the information relevant as to whose services were to be terminated was to be found in

the respective staff files."

The application of the **audi alteram partem** rule in relation to the dismissal of workers in the public service who are employed temporarily in a full-time capacity was considered recently by this court in **Administrator, Transvaal, and Others v Zenzile and Others** 1991(1) SA 21 (A) ("the **Zenzile** case"). The service contracts of the workers in that case were terminable on 24 hours notice on either side. Without having been afforded any hearing the workers concerned were summarily dismissed on the grounds of alleged misconduct. In dismissing the appeal in the **Zenzile** case this court held that the decision of the appellants summarily to dismiss the respondent workers had prejudicially affected the rights of the latter; and that therefore the failure of the appellants to apply the audi principle constituted a procedural impropriety vitiating the decision to dismiss.

On the facts there are the two points of distinction between the Zenzile case and the present appeal: (a) the workers in the **Zenzile** case were summarily dismissed while here the workers were given due notice of termination of their employment; (b) the workers in the **Zenzile** case were dismissed for alleged misconduct whereas here the workers were retrenched. As to what was actually held in the **Zenzile** case it is further to be borne in mind, first, that the court refrained from making any finding in regard to the position of a worker whose contract of service had been ended by the giving of notice, and, second, that (at 30 E-F) stress was laid on the disciplinary and punitive character of the power exercised in summary dismissal for alleged misconduct, it being stated (at 36I) that "when .... the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant."

In the instant case argument in the court below was largely devoted to the question of the applicability or otherwise of the decision in the **Zenzile** case to the facts in the application before **Didcott J.** The learned judge concluded (at 594A) that in principle the matter before him was indistinguishable from the **Zenzile** case. He reasoned thus (at 593 E-J):-

> "The contemplated invasion of an existing right is, by and large, sufficient in the field of employment to bring the [audi alteram partem] rule into operation. And that right is surely threatened once a dismissal by notice is on the cards, no less than when a summary dismissal happens to be. That the action proposed is punitive or disciplinary may no doubt serve sometimes to emphasise or illustrate the threat it presents to an existing right, or to the liberty or property of the individual which the rule likewise protects. It may also have a bearing on the nature, scope and content of the hearing that must be given. Otherwise, however, the significance of the characterisation is not obvious. In itself, at any rate, such is not the test.
>
> The respondents' counsel argued that the rule had not come into operation because the applicants

> had lacked existing rights. Their rights, he maintained, had necessarily to be rights to continued employment. And an employee whose employment was terminable on a month's notice had no right to continue employment, or none, at all events, to an employment continuing beyond the period of notice, during which it was not in any event invaded. By the same token, however, an employee guilty of misconduct sufficient to justify his dismissal has no right to employment continuing beyond the commission of the misconduct. Yet the rule operates in his favour. The **Zenzile** judgment said so. The argument lost sight of the distinction between the Administration's right under the contract and the Code to terminate the employment of the applicants on the one hand, and its exercise of that right, on the other. The lawful exercise of the right depended on the way in which it was exercised, on the procedure that was then followed. In the meantime the existing rights of the applicants remained intact."

Before turning to the argument advanced on behalf of the appellants in the present appeal it is necessary to make a few general remarks concerning the compass of this court's decision in the Zenzile case:-

(A) Although the finding in the Zenzile case was confined, on the facts of that matter, to the applicability

of the **audi** rule to the summary dismissal on the grounds of alleged misconduct of a public sector employee, the conclusion at which this court arrived nevertheless involved the affirmation of certain legal principles of general application to the dismissal of an employee by a public authority. See what was said at 34B - 36A; 35H - 36A; and the following statement (at 36H):-

> "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 exercise of such right."

(B) The **Zenzile** judgment contains a lengthy quotation (at 31E - 32D) from the remarks made by **Van Coller J** in **Mokopanele en Andere v Administrateur, Oranje Vrystaat, en Andere** 1989(1) SA 344(O) at 440G - 441H. This court (at 32D - E) proceeded to signify its agreement with the view expressed by **Van Coller J** that the decision in **Le Roux v**

Minister van Bantoe-Administrasie en -Ontwikkeling 1966(1) SA 481(A) did not support the argument advanced on behalf of the employer in the **Mokopanele** case. This court, however, neither considered nor approved the suggestion made by **Van Coller J** (in the passage quoted at 31F - G of the **Zenzile** judgment) that where the services of a public sector employee had been terminated by notice - leaving aside the matter of such employee's pension rights - there could not be "'n aantasting van regte .... in die sin van 'n aanspraak om in diens te bly nie."

(C) The conclusion of this court in the **Zenzile** case (1) in no way depended upon the fact that the workers concerned were members of the pension fund (see 39D - E); and (2) involved no reliance upon the doctrine of legitimate expectation (see 39G).

I turn to the ground upon which it was sought to attack the judgment of **Didcott J.** The heads of argument

filed on behalf of the appellant included a submission that in the case of the respondents the provisions of the Act excluded, by necessary implication, the operation of the audi rule. At the hearing of the appeal the abovementioned submission was - in my opinion wisely - jettisoned. Counsel limited his argument to the contention advanced by him in the court below. As I understand the argument it amounts to the following. It is said that a public sector employee whose contract of service is terminable on notice has no legal right, after such notice has been duly given, to remain in his employment beyond the expiration of the period; and that from this it follows that here no existing right of such employee has been affected. In my opinion this argument is untenable, and it was rightly rejected (at 593 I-J) by **Didcott J.** The argument misconceives the requirements of the audi rule. The rule does not require that the decision of the public body

should, when viewed from the angle of the law of contract, involve actual legal infraction of the individual's existing rights. It requires simply that the decision should adversely affect such a right. No more has to be demonstrated than that an existing right is, as a matter of fact, impaired or injuriously influenced. Here the contract of service created reciprocal personal rights for the respective parties. Of immediate significance for the respondents was their right to receive regular remuneration in exchange for their services. The existence of that right was linked to and depended upon the duration of the contract. The appellants' right under the contract to give notice terminating it cannot alter the fact that the decision to give notice palpably and prejudicially affected the existing rights of the respondents. In approaching the court below the respondents in no way challenged the appellants' contractual right to give them notice. They

did no more than to assert their claim to be treated in a procedurally fair manner before the appellants exercised such right.

For the sake of completeness the following further considerations may be mentioned. The classic formulation of the **audi** rule encompasses not only "existing rights" but also "the property" of an individual when it is prejudicially affected by the decision of a public official. The word "property" would ordinarily tend to connote something which is the subject of ownership. In my view, however, the concept of "property" to which the **audi** rule relates is wide enough to comprehend economic loss consequent upon the dismissal of a public sector employee. To workers in the position of the respondents (and more particularly the first respondent, an elderly individual with eight dependants) the immediate financial consequences of dismissal are likely to be very

distressing.

As in the **Zenzile** case, here too the employer was a public authority whose decision to dismiss involved the exercise of a public power. Such a power has to be exercised regularly and in accordance with the principles of natural justice.

In **South African Roads Board v Johannesburg City Council** 1991(4) SA 1 (A) **Milne JA** in delivering the judgment of this court observed (at 13B - C) that the audi principle -

> "....applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."

In the instant case a just and proper exercise of the power to dismiss involved an inquiry into the

individual circumstances of each of the workers whose retrenchment was being considered. The necessity for such a careful appraisal seems to have been present to the minds of the appellants, but mistakenly they conceived the inquiry to be a one-sided affair. Creeke expressed the belief that all the information relevant to the inquiry was to be found in his staff files. But, given the opportunity of a hearing, the respondents might have been able to call attention to relevant facts and circumstances of which the appellants were unaware; or to make suggestions as to a solution of the problem of the redundant workers which had not occurred to the appellants. In my view this was a case in which elementary fairness required that the respondents should have been accorded a hearing before the appellants took their decision to dismiss the respondents.

The appeal is dismissed with costs, including the costs of two counsel.

G G HOEXTER, JA

E M GROSSKOPF JA)
NESTADT JA)
GOLDSTONE JA) Concur
HARMS AJA)