IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN PORT ELIZABETH

Case no. P 317/2000

In the matter between:

1ST Applicant

THE SOUTH AFRICAN DEMOCRATIC TEACHERS UNION (SADTU)

2nd Applicant

and

DEPARTMENT OF EDUCATION, CULTURE &
E 1ST Respondent
2ND Respondent
3RD Respondent
4TH Respondent
INDEPENDENT MEDIATION SERVICES OF
5TH Respondent

JUDGMENT

NKABINDE AJ.

Introduction

[1] The first applicant, second and third respondents were in the employ of the first respondent, the Department of Education, Culture and Sports, in the Eastern Cape Province. They were employed as educators at Hillside Secondary School. The second applicant is the South African Democratic Teachers Union ("SADTU") which represented the first applicant in the arbitration proceedings and which , as will appear hereunder, was a party to the Education Labour Relations Council. For convenience, I shall refer to the first applicant by his name, Mr Kock, to the second and third respondents collectively as "the respondents" and to the first

respondent as “the Department”.

[2] The applicants sought an order in the following terms:

“ 1. Declaring the agreement entered into between the firsts and the second respondents on 9 September 1999 to be invalid and/or unlawful and/or unenforceable insofar as it affects the first applicant;

2. Declaring that all decisions taken as a consequence of the agreement and in so far as such decisions affect the first applicant to be null and void and that the original decisions declaring the first applicant not to be an educator in excess of the staff required at Hillside Secondary School stand.

3. Costs of suits against the First Respondent; and

4. Costs of suits against the Second; Third; Fourth and Fifth respondents only in so far as this application is unsuccessfully opposed.”.

[3] On February 2001 after considering the matter, I granted the order sought by the applicants in terms of paragraphs 1 and 2, above and ordered the second and third respondents to pay the costs of the application. The reasons therefor were reserved. The reasons now follow.

The factual background

[4] It is common cause that during 1998 the Department embarked on a redeployment exercise in terms of which teachers were identified as being either in excess of the requirements of a particular school (and accordingly fell under the redeployment exercise), alternatively, were categorized as falling within the requirements of the particular school (and accordingly were allowed to remain at that school). The redeployment exercise was premised on a lengthy consultative process conducted, for the most part, in formal staff meetings. With a view to regulate this consultative process, the Education Labour Relations Council (“the Council”), to which SADTU, representing educators, and the department are parties, adopted a resolution

known as Resolution 6 of 1998 ("the resolution"). The resolution, generally speaking, deals with the determination of which educators fell to be declared in excess. Of particular relevance are sections 5 and 6 of the resolution. Section 5 provides for the rationalization of the particular school, i.e the determination of how many posts the particular institution should be allowed to accommodate, while section 6 deals with the compiling of a list of surplus educators who cannot be accommodated in the posts which have been determined.

[5] Paragraph 6 of the resolution records, *inter alia*, the following:

"6.2 The procedure for the determination of educators in excess shall be as follows:

6.2.2 . . .

After considering paragraph 6.2.1 above the circuit/district manager together with principals shall identify the educators in excess, taking into account the following:-

(a) the views of the educator— staff of the institution as expressed at a formal staff meeting convened by the principal;

(b) the needs of the institution, . . . the number of classes, the timetable and allocation of the learners to classes;

(c) the circuit/district manager shall take cognisance of the fact that there is not necessarily a direct relation between a post identified as in excess and an educator who will be declared in excess, as there may be more than one post with substantially the same duties attached to it;

(d) if a decision still has to be taken regarding two or more educators' competency for the same post, the principle of 'last in first out (LIFO) shall be applied. . .".

[6] The respondents and Mr Kock were educators at Hillside Secondary School ("the School"). Meetings were held at the school in terms of the resolution with a view to determine who of the educators fell excess. At the end of a lengthy consultative process it was agreed by the majority vote, that :--

(i) the school would be divided into certain learning areas;

(ii) all educators would be linked to subjects in which they had a greater workload in 1998;

(iii) the criteria which would be used to identify educators for

redeployment would be -

(a) subject

(b) majority of subject workload in 1998;

(c) length of service.

[7] When the consultative process came to an end, the respondents were declared in excess while Mr Kock was excluded from the redeployment list. One of the respondents, Mr N Paulsen, felt aggrieved that she was one of the educators identified as being in excess. She then referred the matter for arbitration to the Council under the auspices of the Department. The arbitration proceedings commenced but were adjourned for the parties to embark on settlement negotiations. An agreement, which gave rise to the present proceedings, was then concluded. The terms of the agreement read as follows :

"1. The declaration of the employer and one Ms C Blignaut in being excess is to be set aside.
2. In regard to the subjects Afrikaans, Mathematics, Geography and Vocational Guidance, the post allocations are to be revisited in accordance with curriculum needs of the school as at the date of signature hereof.
3. In the selection process, the versatility of the educators are to be considered to occupy the two posts identified, and shall be the sole criteria for such identification of the educators being: Mr Kock
Mr I Hitzerth
Mr MN Paulsen
Ms C Blignaut".

[8] On 10 March 2000 the fourth respondent found that he did not have jurisdiction to adjudicate on the validity of the agreement. Mr Kock and SADTU then approached this court for the relief referred to above.

[9] I may mention at this stage that the fourth and fifth respondents did not oppose the application. The department filed a notice that it abided by the decision of the court save where an order of costs is sought against it. In a letter dated 14 February 2001 and addressed to the State Attorney - Port Elizabeth, the applicants' attorneys confirmed that *no order for costs would be sought against the Department in view of the fact that it was not opposing the application.*

Argument

[10] The argument of Mr Kroon, on behalf of the applicants, was to the effect that in consequence of the agreement Mr Kock was divested of the security of his employment which he enjoyed after the aforementioned consultative process. He was declared as being in excess. Mr Kroon argued further that the agreement, concluded in Mr Kock's absence, is repugnant to the tenets of fairness which form the foundation of labour law, particularly those which apply in respect of an obligation to consult.

[11] It was argued by Mr Benningfield, on behalf of the respondents, that on a proper construction of the agreements, Mr Kock need not have been given an opportunity to state his case as the agreement did not affect him. Although he argued, on one hand, that the resolution in question was not changed, he conceded, on the other hand, that Mr Kock's former position (i.e prior to the conclusion of the agreement) changed as a result of "the proper application" of the said resolution. He conceded further that, in considering the alleged appropriate way of applying the resolution, Mr Kock was not involved and/or afforded an opportunity to make representations.

Application of the law

[12] It appears from the contentions raised on behalf of the respondents that the respondents have somewhat mischarecterized the issues in that they have confused the procedure with the merits. It is not necessary, for the purpose of this judgment, for this court to concern itself with what Mr Kock was going to say had he been given an opportunity to present his case. What this court has to concern itself with is whether Mr Kock was, in accordance with the rules of natural justice, entitled to have been heard. Hoexter JA stated, in **Administrator, Transvaal & others v Zenzile and others** (1991) 12 ILJ 259, that -

"The fact that an errant employee may have little or nothing to urge on his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing".
(At 273H)

He went on and referred to Wade**, Administrative Law 6th edition** where the learned author puts the matter as follows:

"Procedural objections are often raised by unmeritiorious 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".

[13] As I have already mentioned above, the question for consideration is whether Mr Kock was, in accordance with the precepts of natural justice and I may add, within the context of the Constitution of the Republic of South Africa, Act 108 of 1996("the constitution"), entitled to have been afforded an opportunity to present his case before the conclusion of the agreement.

The Constitutional imperatives

[14] In terms of the Constitution every person whose rights (or legitimate expectation) are affected or threatened is entitled to a procedurally lawful, reasonable and fair administrative action(s. 33(1)).

A brief analysis of the traditional 'natural justice'

[15] The primary procedural safeguards in South African administrative law are expressed by the twin principles of natural justice: *audi alteram partem* ("the *audi* principle") and *nemo iudex in causa sua*: that is, that a public official should hear the other side, and that one should not be a judge in his own cause. As a general rule it may be said that the principle of natural justice apply whenever an administrative act is quasi-judicial. An administrative act was considered to be quasi-judicial if it affects the rights, liberties (and perhaps, the privileges) of an individual.

[16] In the case of 'purely administrative' decisions the decision-maker acts entirely to his discretion(Wiechers Administrative Law 1985 at 124). As a result of this common law classification(which has found its historical origins in the need to make the English common law writs of certorari and prohibition applicable to acts categorized as quasi-judicial, see in this regard Wiechers, supra, at 122). The approach of the judiciary in South Africa to the question of procedural safeguards and administrative law has not been producing useful result because of its sterility: Where a decision of an administration

does not affect rights, or legal rights, or prejudicially affect the rights of persons because the aggrieved person had no right in the first place, it has been held that the *audi alterm partem* rule was not applicable (see: South African Defence and Aid Fund & Another v Minister of Justice 1967 (1) SA 263 (A); Laubscher v Nature, Piet Retief 1958 (1) SA 546 A reaffirmed in Administrateur Van Suidwes Afrika v Pieters 1973 (1) SA 850 (A); Publication Control Board v Central News Agency Ltd 1970 (3) SA 479 (A) at 488).Minister of Interior v Bechler 1948 (3) SA 409 (A) at 451). In Down v Malan, NO. en Ander 1960(2) SA 734 (A) at 741 a quasi- judicial decision was said to include one which affects the person's interests. There are , of course, many variants in other cases dealing with this point.

[17] A serious criticism been directed against the classification by authoritative writers(see: e.g Hlope's and Baxter's articles, infra) for its sterility, stagnation and obstruction to the development of the administrative law. L.G Baxter 'Fairness and Natural Justice in England and South African Law' (1979) 96 SALJ 607 at 638 describes the common law natural justice as being —

"...little short of a miracle of judicial creativity when the fairness approach is employed...the duty to act fairly affords scope for the development of urgently procedural safeguard and against arbitrary administrative action such as not been available under the orthodox approach to natural justice; natural justice unfortunately accumulated a mass of dead wood which held any development.".

[18] Schriener JA, as he then was, in Pretoria North Town Council v A.1 Electric Ice-Cream Factory Pty Ltd 1953 (3) SA 1 (A) sounded a caveat that —

" The classifications of discretions and functions under the headings of "administrative", "quasi-judicial" and "judicial" has been canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification when achieved...one must be careful not to elevate what may be no more than a convenient classification into a source of legal rules. What primarily has to be considered...is the statutory provision in question, read in its proper context."

(At 11A–C).

[19] A notable and commendable exception in the judicial approach in South Africa is found in the statement by M.T Steyn J in Motaung v Mothiba NO 1975 (1) SA 618 (O) where the learned judge said –

> "Being rules of the common law, this much can safely be said of the principle of natural justice, viz: that they have been a part of our system of law for a very long time and that they are capable of further formulation, growth and practical application to meet the needs of a rapidly developing and expanding society which is continually being subjected to an increasing degree of administrative and bureaucratic regulation and control."
>
> (At 629D).

The approach in the English and South African Courts

[20] The English courts have escaped from the right-privilege distinction towards a more realistic and flexible approach to natural justice by invoking the concept of legitimate expectation. In Ridge v Baldwin [1964] AC 40 at 72ff Lord Reid disagreed with the view that the principle of natural justice applied only if the exercise of administrative powers affected the rights of the aggrieved parties. His speech was quoted with approval, approximately four years later, by Lord Denning MR in Schmidt & Another v Secretary of State for Home Affairs [1969]1 AllER 904 at 909 where the learned Judge said–

> "The speeches in Ridge v Baldwin 1964 AC 40 show that an administrative body may, in a proper case, be bound to give a person who was affected by that decision an opportunity of making representations. It all depends on whether he has some right or interest, or I would add, some legitimate expectation of which it not be fair to deprive him without hearing what he has to say."

[21] The above approach in the courts of England avoids the temptation of classifying functions, thereby avoiding the conceptualism which had to be exposed in Baldwin's case and enables the courts to give effect to the inherent flexibility of natural justice which is based upon underlying principles of fairness. The feature of modern English administrative law is therefore that the classification of decisions into judicial, quasi-judicial and administrative no longer seems to have much relevance, if any, in this sphere.

[22] In Everet v Minister of Interior 1981 (2) SA 453(C), Fagan J (with whom Lategan J concurred) commendably invoked the concept of 'legitimate expectation' to the South African law. The applicant, a British citizen by birth, had desired to become a permanent resident of South Africa. She had no intention of returning to England. She applied for an extention of her temporary residence permit for one year, during which she intended to make further representations to the immigration authorities to be granted permanent residence. This application was granted, and her temporary permit was finally extended until 8 July 1980. On 10 June 1980 she was served with a letter in terms of which the Minister of Interior had, under the powers vested in him by section 8(2) of the Aliens Act of 1937,ordered that her temporary residence permit be withdrawn with immediate effect. She was ordered to leave the country on or before 11 June 1980. She then applied to the Supreme Court for an order setting aside the notice purporting to withdraw her temporary residence permit on the ground, *inter alia*, that it was contrary to natural justice as she had not been afforded an opportunity of making representations. Fagan J concluded that there had been a breach of the principles of natural justice. The Minister's notice was therefore set aside. The decision in Everet has established that the rules of natural justice require that an opportunity of being heard must be given before any decision affecting the legitimate expectation of any individual is made. The decision has, however , been criticized for certain flaws by some writers. It will serve no purpose, for the purpose of this judgment, to enter into criticism levelled against this. It suffices to say that our courts have begun to give a greater recognition to the broader concept of natural justice.

[23] The court was, in Castel NO v Metal & Allied Workers Union 1987 (4) SA 795 (AD), unsuccessfully invited to adopt the approach in vogue in the courts in England. Being mindful of the criticism levelled at several of the court's decisions on the point under discussion, Hefer JA declined the invitation because, he said, 'the legitimate expectation' approach had —

> "no room for its application here... unlike the English and Australian cases on which counsel relied, nothing had happened before the application for authority was submitted and nothing happened thereafter which could have caused the applicant to entertain such an expectation..."

[24] Fortunately, greater recognition is given by our courts to the broader concept of the principle of natural justice. The traditional scope of the principles relating to the observance of natural justice has been extended to decisions affecting a person who has no existing right, but merely a legitimate expectation (Everet's case,supra; Langeni and Others v Minister of Health and Welfare and Others 1988 (4)SA 93 (W); Mokoena and Others v Administrator, Transvaal 1988 (4) SA 912 (W). An illustrative discussion of the topic also appears in the following articles:(1987) 165 SALJ "Legitimate Expectation and Natural Justice: English, Austrialian and South African Law" by John Hlope, and (1979) 96 SALJ 607 "Fairness and Natural Justice in E nglish and South African Law" by L. Baxter).

[25] Against the backdrop of cases explored, I return to the issues raised in the instant case. It was Mr Kroon's contention that Mr Kock's right to the security of his employment had been affected by the agreement in question and that failure to give him a hearing was contrary to the tenets of natural justice. It was not disputed, correctly in my view, that Mr Kock's position or status was altered as a result of the agreement. Consequently, following the sentiments expressed in the abovementioned cases and the views of authoritative writers referred to above, it is manifest that the agreement affected Mr Kock's rights or interests. In my view, Mr Kock was entitled to expect to be given an opportunity to make representations before the conclusion of the agreement. His right was affected. By this I am not proposing that a right sought to be taken away was the requirement for the observance of the tenets of natural justice, as was apparently, suggested in Mokoena's case, supra, at 918 E. When the Department failed to give Mr Kock an opportunity to make representation, it acted contrary to the tenets of natural justice because he was not given the elementary right to be heard.(See Bechler's case at 451; Administrator, Transvaal & Others v Traub and Others 1989 (4) SA 731; (1989) 10 ILJ 823; Unilong Freight Distributors (Pty) Ltd v Musser (1998) ILJ 229 (SCA) at 238A).

Conclusion

[26] For these reasons, I found that the principles of natural justice had not been

observed. Failure by the Department and the respondents to apply the *audi alteram partem* rule has constituted a procedural impropriety vitiating the agreement in so far as it affected Mr Kock. Accordingly, the argument advanced on behalf of the respondents had to fail.

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B.E NKABINDE

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

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For the respondents:	Mr P.G Benningfield
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Date of hearing:	27 February 2001
Date of judgment:	30 March 2001