(18)

IN THE SUPREME COURT OF TRANSKEI
(GENERAL DIVISION)

In the matter between: Case No.:698/92

HUDSON SIZAKELE GEMI APPLICANT

and

THE MINISTER OF JUSTICE RESPONDENT

JUDGMENT

PICKERING, AJ. : On 15 May 1992 applicant applied for and was granted a rule nisi calling upon the respondent to show cause why an order in the following terms should not be made :

"4.1 That the transfer of applicant by respondent from the Attorney-General's office, Umtata to the Magistrate's office, Mount Frere be declared invalid and be set aside.

4.2 That respondent and/or any of its subordinates be restrained and interdicted from giving effect to the transfer mentioned above.

4.3 That respondent pay the costs of this application."

It was further agreed between the parties and made an order of Court that pending the outcome of the application the applicant would report for duty at the Magistrate's office, Umtata.

It is unfortunately necessary to set out in some detail the long and troubled history to this matter.

Apart from a prior period of employment with the Transkeian Government which is not relevant to this matter the applicant has been in the employ of the Transkeian Government for nine years since December 1983. After having been initially appointed as an assistant administrative clerk in the Department of Education he was subsequently transferred, at

his own request, to the office of the Attorney-General, Umtata with effect from 3 March 1986. He is presently still so employed at that office as an assistant administrative clerk. In terms of his conditions of employment applicant was bound, inter alia, not to accept renumerative work outside the Transkeian Government Service without permission. He was also liable, in terms thereof, to be transferred to any office or department in Transkei. He was further bound by the provisions of section 14(1) of the Public Service Act No.43 of 1978 which provides :

> "Subject to the provisions of this Act, every officer and employee shall, whenever the public interest so requires, be liable to be transferred from the post or appointment held by him to any other post or appointment in the same or any other department, whether or not such post or appointment is in another division, or is of a lower grade and whether or not such post or appointment is within or outside Transkei ...".

It is common cause between the parties that for a number of years the applicant performed his duties as an assistant administrative clerk competently, so much so that during 1990 the Attorney-General, in a merit assessment addressed to the Director-General of Justice, furnished a glowing report of his capabilities and concluded by stating that he had no hesitation in recommending applicant "for a merit assessment of 75%." According to applicant, however, the seeds of future discontent had already been sown with the arrival in 1989 of Mr. Reebein as Deputy Attorney-General. Applicant avers that from the outset relations between himself and Mr. Reebein were strained largely because he questioned instructions given to him by Mr. Reebein which he felt were unreasonable in that they were either impossible or near impossible of compliance. He alleges further that shortly after the arrival of Mr. Reebein it became apparent to him that Mr. Reebein was what he termed "the boss boy/foreman type of supervisor."

Mr. Reebein denies that his relationship with applicant was on a bad footing from the outset. He points out that as Deputy Attorney-General he was entrusted with, inter alia, the daily running, functioning and administration by the office of the Attorney-General including the supervision and control of clerical and professional staff members and

that he had to ensure that the daily incoming work received by the office of the Attorney-General was promptly and efficiently attended to. As such, office discipline fell within his sphere of duty and he was obliged to report all misdemeanours or misconduct on the part of staff members to the Attorney-General. He was also obliged to monitor and supervise the work done by the clerical staff and to report any dereliction of duty to the Attorney-General. He avers that in terms of his appointment as Deputy Attorney-General he would personally have been guilty of dereliction of duty should he have failed to supervise the staff under his control and to report any misdemeanours or dereliction of duties on their part. Because of his duties aforesaid he was in a position to assess the productivity and efficiency of each staff member and was therefore required to assist the Attorney-General when merit assessments were compiled by him. He was directly involved in the applicant's merit assessment of September 1990 which was in fact the result of, inter alia, his own assessment of applicant's work and of his own report to the Attorney-General.

Both Mr. Reebein and the Attorney-General, Mr. Nel, aver that during or about July 1991 a deterioration in the standard of work performed by applicant became apparent, and that during August 1991 it became apparent that applicant was no longer devoting all his time and energy to the duties entrusted to him and was often absent from his office without anyone knowing where he was and without asking leave to absent himself. Mr. Reebein states that his 'friendly' requests to applicant to remedy his conduct were ignored and it became necessary to address him in sterner terms. Because this too had little or no effect Mr. Reebein decided to give the applicant written instructions so that there could be no dispute in regard to his duties and his failure to attend thereto.

All these averments concerning applicant's alleged dereliction of duty are strenuously denied by applicant who further avers that Mr. Reebein had either not gained sufficient experience in personnel matters or deliberately acted maliciously and vindictively towards him. He stated further that Mr. Reebein was not in a position properly to assess applicant's work performance and denied that there ever was a stage when he no longer devoted all his time and energy to his duties or when he

was absent without leave.

On 23 August 1991 Mr. Reebein addressed a handwritten note to applicant requesting him to explain in writing why certain files had not been drawn. Applicant responded to this note in what Mr. Reebein termed with some justification "a most insulting, offensive and insubordinate manner", accusing Mr. Reebein of having what he termed a "baaskap attitude" and of being guilty of racism.

Applicant denies that his response was "insulting, offensive or insubordinate" or that he had "unjustly" accused Mr. Reebein of prejudice and racism as stated by Mr. Reebein. Surprisingly enough no action was taken against applicant in connection with the contents and tone of this letter but there was some discussion between Mr. Reebein and applicant concerning applicant's response and Mr. Reebein states that he explained to applicant that his allegations concerning "baasskap" were totally unfounded and that he had simply acted in the best interests of the public service as he was obliged to do. He also explained to applicant that he was obliged to report his dereliction of duty and insubordination to the Attorney-General and applicant appeared to accept the situation and his bona fides. Applicant admits that Mr. Reebein objected to his accusation of "baasskap" but denies that Mr. Reebein made any mention of any dereliction of duty or insubordination and states that he did not accept nor did he say anything to suggest that he accepted the situation and Mr. Reebein's bona fides.

Thereafter, according to Mr. Reebein, although obviously not according to the applicant, applicant's standard of work in the office went from bad to worse and Mr. Reebein continued to reprimand him almost on a daily basis.

On 24 February 1992 the applicant applied in writing for a transfer from the office of the Attorney-General to the office of the Magistrate or the Regional Magistrate in Butterworth. The reason given by applicant for such request was not, as might have been expected, the tension existing between himself and Mr. Reebein in the Attorney-General's office but the following :

> "As the breadwinner at home, am often required to attend to my ailing/sickly immediate members of my family either physically or by giving whatever

> assistance that is needed to take one to a physician. By immediate members of my family I mean my wife and children who have lately been the victims of ill health. It was from about the close of last year that my attention at home was ever so needed and the distance between my work-place and home has become a real concern.
>
> I hope, Sir, that you and my department will appreciate that fact that one's family is unarguably valuable to him and that therefore if any suitable vacant post exists in that district your assistance in having me placed there will be highly valued. I appreciate the fact that vacant posts are not always readily available, but hope that should an opportunity present itself it will be utilised to solve my problem."

In amplification of the reasons set out in his aforesaid letter applicant stated in his founding affidavit that his home is in the district of Kentane about a quarter of a kilometer from Tafalofefe Hospital where his wife is employed as a nurse. His wife and children stay at his Kentane home and he visits them every weekend which, with his reliance on public transport, was not only onerous for him but disruptive of his family life. More recently, however, members of his family, especially his wife, had been victims of ill health and he had been obliged to afford them even more attention than before.

According to Mr. Reebein applicant's request for a transfer came to his attention at the end of February 1992 and he accordingly decided to desist with his daily requests that applicant attend to his duties and to await the outcome of the application. Eventually, however, applicant's dereliction of his duties reached such a nadir that Mr. Reebein felt obliged to diccuss the matter verbally with him on 31 March 1992 and demanded that he bring his duties up to date by Friday 3 April 1992. After a further investigation on 3 April 1992 which, according to Mr. Reebein, disclosed numerous shortcomings in applicant's work, he compiled a written report in which he detailed the problems existing in relation to certain files and dockets. The ultimate paragraph of this report reads :

> "I have verbalised my dissatisfaction about the inefficiency of Mr Gemi on numerous occasions. He is persistently not in his office attending to his work during office hours. Nobody seems to know where he is when asked. He has often been instructed to advise either you or me before he

> leaves the office. This is seldom if ever done. His absence from office either on leave or sickleave is extremely disruptive. He must be pressed for completed leave forms failing which he will not attend to this. It is now in the interests of this office that steps be taken to transfer Mr Gemi to another office outside the Attorney-General's office. If this is not done we are going to be embarrassed by his dereliction of duty."

This report was submitted to the Attorney-General on 8 April 1992 and forwarded by the latter to the Director-General Justice on 10 April 1992 together with a covering note stating that the "statistics and facts are such as to warrant proceedings in terms of chapter 4 of the Public Service Act of 1978 (inefficiency and misconduct)."

Shortly thereafter, a copy of a letter dated 10 April 1992 and directed to applicant by the then Director-General of Justice came to the attention of both the Attorney-General and Deputy Attorney-General. In the letter the Director-General drew the attention of applicant to an article in the Daily Dispatch newspaper of 31 January 1992 which concerned the opening in Kentane during the first week of February 1992 of a night school known as the SM Gemi Memorial Night School. According to the article the applicant, who was described as being the Managing Director and Chairman of the school, had established such school in memory of his father. After referring to the relevant provisions of the Public Service Act 1978 which prohibit an officer from performing or engaging in remunerative work outside his employment in the Public service without the permission of the Minister, the Director-General invited the applicant's comments on the matter. The applicant eventually only replied to this letter on 5 May 1992 and I will return to this aspect later in this judgment. This was the first time that the Attorney-General and Mr. Reebein became aware of applicant's involvement in the night school and the Attorney-General states pertinently that it became clear to him that applicant's involvement therein was the direct cause of his dereliction of duty. He avers that applicant's application for a transfer to Butterworth was "motivated by self-interest and for purposes of furthering his business activities in his night school rather than considerations of alleged ill health on the part of members of his family." Mr. Reebein avers that he came to the same conclusion.

So too does Mr. Tantsi, the Deputy Director-General of Justice, who states in his affidavit that the inference is inescapable that applicant's involvement in the night school was the direct cause of the deterioration of his standard of work.

Mr. Tantsi in dealing with applicant's letter of 24 February 1992 comments that he has "little doubt that his application for a transfer was motivated solely by a desire to become more actively involved in his night school and not to attend to the "ailing/sickly members of his family" as alleged by him." It may be convenient at this stage to refer to the fact that applicant, in his replying affidavit, annexes medical certificates which prima facie show that his wife was in fact being treated for chronic inflammation of the pelvis. Mr. Tantsi further states as a fact that applicant's involvement in the night school is in contravention of his conditions of employment and the provisions of section 26 of the Public Service Act. He averred that the Attorney-General's report of 10 April 1992 was received by his office on 13 April 1992 at a time when applicant's application for a transfer to Butterworth was still under consideration by the Management Committee of the Department of Justice. The Director-General of Justice is the Chairman of this committee which consists of, inter alia, the Deputy Director General and other heads of offices. The committee considers, inter alia, applications for transfer and reports of misconduct on the part of justice officials. Whenever an application or a recommendation for a transfer is made the Management Committee takes into account the qualifications, relative merit, efficiency and suitability of the person to whom the application or recommendation relates, as well as the public interest generally such as vacancies, availability of posts, human relationships, personalities and all other relevant matters. Once management has considered the matter recommendations are made to the Minister of Justice who then either accepts or rejects such recommendations.

Mr. Tantsi avers that the Management Committee was obliged to and did consider the application for the transfer to Butterworth against the background of the complaints set out in the Attorney-General's report. He avers further that the Management Committee in considering the application and the complaints also took into account the following:

"(a) the matters referred to in paragraph 6 above (these relate to the public interest etc as set out above);

(b) the fact that there was not a suitable vacancy in Butterworth;

(c) the fact that there was a suitably qualified officer in the employ of the Department of Justice stationed in the Magistrate's Court of Mount Frere who could be transferred to Umtata and who could fill the vacancy left by applicant;

(d) that, by reason of his transfer to Mount Frere, the applicant would be less tempted to devote his time and energy to his "night school" in contravention of his conditions of employment and Section 26 of the aforesaid Act;

(e) that it is likely that if the applicant confines his time and energy to his work, his work performance may increase to the benefit of both applicant personally and the Public Service;

(f) that on all available and uncontested evidence the work performance of the applicant in his present position was unacceptable and not in the interest of the Public Service;

(g) that, in the course of a proposed inquiry to be conducted into the allegations of misconduct made by Mr Mr. Reebein, the applicant will have the opportunity of making any explanations he may be advised to make and replying to the charges preferred against him and be represented if he so wished; and

(h) all representations made by the applicant in respect of both his application for a transfer and the complaints lodged against him by Mr. Reebein, as evidenced in the annexures to Mr. Reebein's affidavit."

Mr. Tantsi stressed that the decision to transfer applicant to Mount Frere was a direct result of applicant's own application for a transfer and that whilst the complaints set out in the Attorney-General's report were taken into account in deciding the place to which applicant should be transferred he was not transferred solely as a result of those complaints. In further amplification he stated that "Mr. Reebein did not decide on applicant's transfer. He reported applicant's conduct to the Attorney-General with certain recommendations, who, in turn,

reported the matter to me and I referred it to the Management Committee. Having considered the matter fully, Management endorsed the recommendations." Mr. Tantsi then states that the Management Committee resolved to recommend to the Minister that :

> "(a) the applicant's application for a transfer be successful;
>
> (b) the applicant be transferred not to Butterworth but to Mount Frere; and
>
> (c) an enquiry be held in terms of section 18 of the Public Service Act, 1978 into the charges of misconduct against the applicant as contained in the letter of the Attorney General, annexure "H" hereto."

These recommendations appear to be in accordance with the note which it is now common cause was written by Mr. Tantsi and which is appended to the foot of the covering letter of 10 April 1992 to the Attorney-General's report. This note states :

> "DDG /CCD/CD Pse :-
>
> 1.(a) have Mr Gemi charged for misconduct ito section 18(c), (d) and (e) of Act 43/78;
>
> (b) transfer (and replace) him out of (illegible) but not near CENTANE - his home and night school!
>
> 2. Note that (e) relates to the night school at CENTANE."

This may be a convenient stage to mention that it is common cause that Butterworth is situated approximately 140 kilometres south of Umtata and that applicant would accordingly be that much closer to his family at Kentane, whereas Mount Frere is located to the north of Umtata, a further 100 kilometres in the opposite direction to Kentane.

In accordance with this decision the then Director-General, Mr Maqungo, addressed the following communication to respondent on 22 April 1992 :

> TRANSFER : MR H.S. GEMI : ASSISTANT ADMINISTRATIVE CLERK.

> As a result of complaints lodged by the Attorney General against Mr Gemi's work performance it has become necessary to transfer him to the Magistrate's Office, Mount Frere to fill the post to be vacated by Miss Dywili who is to replace him at the Attorney General's Office.
>
> Your approval of the transfer with effect from 4 May 1992 at Government expense in terms of Chapter G.1.1.(a) of the Transkeian Government Regulations is hereby sought, please.

It will immediately be noticed that the sole reason given to the respondent by the Director-General for the transfer was the complaint of the Attorney-General and that this letter is therefore at variance with Mr. Tantsi's averments to the contrary.

The recommendations of the Management Committee were approved by the respondent on 23 April 1992.

On 28 April 1992 applicant was informed of this decision in writing by the Director-General. On the same day and in somewhat immoderate language applicant responded in writing objecting strenuously to the proposed transfer and on 4 May 1992 his attorneys addressed a letter of demand to respondent. On 5 May 1992 applicant finally responded to the letter of the Director-General dated 10 April 1992 in which applicant's comments on his alleged involvement in the night school had been requested. As with so many of applicant's comments and averments his response is couched in intemperate, emotional and extravagant language when a simple statement of fact was called for and when the nature of the complaint against him must have been quite clear to applicant. His reply, insofar as it is relevant, reads :

> "In the style the abovenamed letter is phrased I am unable to reply thereto, though I wish I could. In order to be able to respond I wish to know whether is it alleged that I have contravened the said provision or am I just being made aware of the existence of such a provision. I am now made to wonder whether is it any noteworthy sin to get involved in projects that solely serve to enhance the lives of the community in one's place of residence.

> Were it alleged that I am receiving a salary for my involvement in this project I am frank to inform that I would not hesitate to prefer a proper legal action against whosoever seeks to defame me in that fashion."

It is clear from this reply that, whilst admitting involvement in the night school, applicant denies that he is receiving any renumeration in respect thereof and is averring in effect that his work in respect thereof is charitable in nature.

On 6 May 1992 and in response to applicant's objection to his transfer to Mount Frere, the Director-General, through the Attorney-General, addressed a letter to him advising, inter alia, that his "representations against transfer had been unsuccessful." This gave rise to the application for the rule nisi.

Mr. Poswa, who together with Mr. Madlanga appeared for the applicant, submitted that the respondent had failed to apply his mind properly or at all to applicant's application for a transfer to Butterworth and accordingly to the question of the further transfer of applicant to Mount Frere. Were this not the case, so he argued, the respondent could never have stated that applicant's request for a transfer to Butterworth was successful and, in the same breath, that he was transferred to Mount Frere. In my view, however, although the respondent seems gratefully to have latched onto applicant's own request for a transfer when it suddenly appeared in the midst of the stormy seas of discontent raging in the Attorney-General's office he did in fact consider independently the issue of the applicant's application for a transfer to Butterworth and that of his subsequent transfer to Mount Frere, despite the inept manner in which the recommendations of the Management Committee were phrased. The former application was rejected in no uncertain terms firstly on the basis that should he be transferred to Butterworth he would be tempted to devote even more time and energy to his night school in Kentane to the further detriment of his work; secondly, that his wife and family members are not in fact ill as alleged by him in his letter motivating the application for transfer; and, thirdly, that in any event no suitable vacancy existed in Butterworth. The respondent thereafter, independently of the application for a transfer to Butterworth, decided that it was in the public interest to transfer applicant to Mount Frere.

In any event, as was submitted by Mr. Alkema, who with Mr. Beukes appeared for the respondent, the applicant never pertinently raised the issue of a failure by respondent to apply his mind to the question of applicant's transfer and this issue was accordingly never fully canvassed by respondent in the answering affidavits filed on his behalf.

By reason of all the material disputes of fact revealed on the papers I am further unable to find, as was urged upon me by Mr. Poswa, that respondent's decision to transfer applicant to Mount Frere was actuated by malice or that it was a disguised disciplinary measure. On the contrary the fact that applicant is to face a disciplinary enquiry into the allegations of misconduct by Mr. Reebein would tend to militate against such a finding.

Mr. Poswa further submitted that the decision to transfer applicant to Mount Frere was unfairly taken in violation of the principles of natural justice, more particularly the audi alteram partem rule. In this regard he submitted with reference to the case of Administrator, Natal and Another v Sibiya and Another 1992 (4) SA 532 (A) that the decision to transfer applicant to Mount Frere infringed upon his property rights. He submitted that applicant would suffer economic loss consequent upon his transfer arising out of his costs of relocation and of accommodation in Mount Frere. On the assumption that the dictum in Sibiya's case supra at 538 J - 539 B concerning the concept of "property" would apply to economic loss in the sense contended for by Mr. Poswa, I am in any event of the view that Mr. Alkema is correct in his submission that applicant has laid no factual basis in his affidavits for a finding that he will in fact suffer economic loss in consequence of the transfer. I am satisfied therefore that applicant has not demonstrated that "an existing right, was as a matter of fact, impaired or injuriously influenced" (See Administrator, Natal and Another v Sibiya and Another supra p 538 G - H).

The remaining issue to be decided is whether applicant has established that his case falls within the ambit of the doctrine of legitimate expectation. At the outset of his argument Mr. Alkema accepted, for purposes of this application, that the provisions of the Public Service Act 1978, do not either expressly or by necessary implication exclude

the principle of audi alteram partem. In support of his contention that there was no room for the invocation of the said doctrine in this application Mr. Alkema relied, inter alia, on the case of Ngema v Minister of Justice, Kwazulu and another; Chule v Minister of Justice, Kwazulu and Another 1992 (4) SA 349 (N). In that matter Levinsohn J, with whom Mitchell J concurred, dissented from a decision of Didcott J in Hlongwa vs Minister of Justice of Kwazulu (1992) 13 ILJ 338 (D) and held that the Hlongwa case was not a case where the doctrine of legitimate expectation should have been applied. The point in issue in the cases of Ngema and Chule as well as that of Hlongwa was the legality or otherwise of the decisions of the Minister of Justice of Kwazulu to transfer the applicants, who were all employees of the Kwazulu Public Service, from their existing stations. Didcott J in Hlongwa's case, supra, was of the view that the views and the personal circumstances of the applicant in that case were relevant and ought to have been taken into consideration and that the applicant ought therefore to have been heard before the decision to transfer was taken. The relevant passages of this judgment are set out at length in Ngema and Chule's case supra at 358 F - 359 H and I do not propose to repeat them herein.

In Ngema's case supra at 360 C - D Levinsohn J stated as follows :

> "Corbett CJ in Traub's case supra cited with approval the dicta of Lord Roskill in the case of Council of Civil Service Unions and Others vs Minister for the Civil Service [1984] 3 ALL ER 935 (HL) at 944 a :
>
> > Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."
>
> I do not think that it was established in the Hlongwa case supra that a promise was made or that a practice existed. Indeed, on the papers before us in the present application it has not been proved that there is such an established longstanding practice in the Kwazulu Public Service or indeed in any other Public Service in this country which requires that there be consultation with the proposed transferee prior to the decision to transfer him. In fact I would think that everyone who joins a Public Service must realise that the possibility of transfer is, as it were, an occupational hazard and it may occur during his career."

In the opinion of Levinsohn J, considerations such as the facts that a particular official may have settled down in a particular district, that his health may be detrimentally affected by transfer and that he may have become proficient in a particular field of expertise and as a result of a transfer be called upon to perform other duties, did not establish a legitimate expectation in the sense that a firm practice had arisen or that an undertaking had been given to the official concerned that, because of those factors, he may remain on at his present station. (Ngema's case supra at 360 D - I).

Ngema's case was followed in this division by Mall AJ. in the matter of Maqungo vs The Government of the Republic of Transkei and Others unreported case no. 789/92, the applicant in that case being, ironically enough, the former Director-General of Justice mentioned above. I am bound by that decision unless I am satisfied that it is clearly wrong.

In Traub and Others v Administrator Transvaal and Others 1989 (4) SA 731 (AD) Corbett CJ. stated as follows at 758 G - 759 A :

> "A frequently recurring theme in these English cases concerning legitimate expectation is the duty on the part of the decision-maker to "act fairly". As has been pointed out, this is simply another, and preferable, way of saying that the decision-maker must observe the principles of natural justice (see O'Reilly's case supra at 1126 j - 1127 a; Attorney-General of Hong Kong case supra at 350 g - h; Council of Civil Service Unions case supra at 954 a - b). Furthermore, as Lord Roskill explained in the last quoted case, the phrase, "a duty to act fairly", must not be misunderstood or misused. It is not for the Courts to judge whether a particular decision is fair. The Courts are only concerned with the manner in which the decisions were taken and the extent of the duty to act fairly will vary greatly from case to case. Many features will come into play including the nature of the decision and the relationship of those involved before the decision was taken (see at 954 b - c); and a relevant factor might be the observance by the decision-maker in the past of some established procedure or practice. It is in this context that the existence of a legitimate expectation may impose on the decision-maker a duty to hear the person affected by his decision as part of his obligation to act fairly. (See at 954 e; of Lloyd and Others v McMahon [1987] 1 All

ER 1118 (HL) at 1170 f - g.)"

Traub's case has been approved and applied by the Transkei Appellate Division in Minister of Local Government and Land Tenure vs Inkosinathi Property 1992 (2) SA 234 (TKA). See too: Minister of Local Government and Land Tenure v Sparg and Another, unreported Transkei Appellate Division case dated 25 November 1992.

Mr. Alkema, whilst accepting that there is no numerus clausus of circumstances under which a legitimate expectation to be heard may arise, has strongly urged upon the Court that it must find a limit within which the doctrine must operate and that there must accordingly be a factual basis for finding that a legitimate expectation exists. The doctrine does not, as he put it, operate in a void. He submitted that in the circumstances of the present case such a limiting factor would be the existence of a past practice or of an express promise given by or on behalf of the respondent.

Professor Hlope in his article "Legitimate Expectation and Natural Justice" (1987) 104 SALJ 965 rejects the view that legitimate expectation can only arise from an express promise or the existence of a past practice as both misguided and unwarranted by authority. He contends that a conclusion that a legitimate expectation cannot arise simply out of the power of the decision-maker to decide adversely to the applicant presupposes that the circumstances under which legitimate expectation arises are exhaustive whereas this is not so. According to Professor Hlope, "fairness" is the limiting factor in any given case and in this regard he states as follows at 178:

> "In my view in any given case "fairness" plays an important role in determining whether the expectation should be characterised as legitimate for the purposes of natural justice. Thus it is fairness that determines unfounded or unreasonable expectations should not be afforded the protection of natural justice. It is also fairness which dictates that where the discretionary power is being exercised over a person, he may well be entitled to expect that it will not be exercised unfavourably or unfairly without his having been afforded a hearing."

In Professor Hlope's opinion, therefore, the view that a legitimate expectation can arise only from express assurances or regular practices should be discarded as this would lead back to the deficiencies and anomalies which the doctrine sought to remove.

Professor Hlope's article finds an echo in an article by Professor Grogan, "When is the 'Expectation' of a Hearing 'Legitimate'" (1990) 6 SAJHR 36. In what is described by Cora Hoexter in the Supplement to Baxter, Administrative Law, at p 77 as a valuable article Professor Grogan refers to the dictum by Corbett CJ in Traub supra at 758 F namely "the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing". He comments thereanent at p 39:

> "This observation accords with the spirit of the legitimate expectation doctrine as well as with common sense. To ask whether a person's expectation of a hearing was 'legitimate' is in effect to ask whether denying him a right to state his case was reasonable in all the circumstances. It may, therefore, be preferable to recast the test in terminology with a more familiar ring. Instead of talking of the 'legitimacy' of the expectation - thus using the perceptions of the aggrieved individual as the yardstick - it would seem preferable to ask whether the denial of a hearing was reasonable in the circumstances. Such an approach would have the merit of directing the inquiry towards the actions of the persons responsible for the decision, and not at the perceptions of their victims. As far as the procedural requirements of administrative action are concerned, a public authority can be said to act reasonably where it acts fairly and rationally. And both fairness and rationality demand in many instances that such authorities should hear the views of people who stand to be adversely affected by their decisions."

At p 43 Professor Grogan states further

> "To limit the right to a hearing only to those cases in which an applicant can show that his expectation is founded on some past right or privilege is...to impose much the same constraint on the application of the audi alteram partem

> principle as resulted from the "prior rights" doctrine. There is no reason why a right to a hearing should be extended in principle only to those wishing to renew privileges or rights."

It seems to me, with respect, that the views of Professors Hlope and Grogan are correct. Officials entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly the decision-maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would in most instances be obliged to afford the person affected by the decision a hearing prior to coming to his decision. Officials are not relieved of this duty except to the extent that a departure from the rules of natural justice is expressly or impliedly sanctioned by the relevant enabling legislation. In the absence of such statutory authorisation a departure from the rules of natural justice can only be justified in circumstances where it is necessary to promote some value or end of equal or greater significance than natural justice or, to put it differently,"where circumstances are so exceptional as to justify such a departure".(per Leon J in Dhlamini v Minister of Education & Training 1984 (3) SA 255 (N) at 257 H). By approaching the test in this manner a balance can be struck between "the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in the administration" (Traub supra at 761 G.)

An adoption of the above approach does not, to my mind, in any way conflict with the dictum by Corbett CJ in Traub supra at 758 G - 759 A cited above. In my view Corbett CJ, with great respect, clearly did not intend legitimate expectation to be confined to the factors enumerated in that passage. Nor does its adoption give rise to an unprincipled and limitless extension of the doctrine of legitimate expectation, thereby opening the floodgates as implied by Mr. Alkema, since fairness is always a limiting factor.

It follows therefore that I must, with respect, disagree with the conclusion reached by Levinsohn J in Ngema's case supra, and by Mall AJ

in Maqungo's case supra, that a legitimate or reasonable expectation may only arise either from an express promise given by a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. I am satisfied, with deference to the learned Judges, that these decisions are clearly wrong. That the applicant in casu was not promised that he would not be transferred does not, with respect, drive one to the conclusion that he was not entitled to be heard before he was so transferred. In my view the absence of an assurance that applicant would not be transferred has no bearing on the reasonableness of his expectation that he would be accorded a hearing before a decision adverse to his interests was taken. Respondent's contention that there was no established practice of granting officials in his department hearings before transfers takes the matter no further. As was observed by Corbett CJ in Traub's case supra at 758 I "a relevant factor might be the observance by the decision-maker in the past of some established procedure or practice" (my emphasis). That respondent was of the view that it was not necessary to afford his officials an opportunity to make representations before transferring them against their will does not lead me to the conclusion that he was thereby freed from the duty to respect the rules of natural justice. Were that so, an administrative body would be able to escape the presumption in favour of natural justice simply by consistently flouting it.

I am also of the view, unlike Levinsohn J, that the decision in Castel N.O. v Metal and Allied Workers Union 1987 (4) SA 795 (A) does not preclude me from coming to the above conclusion. In my view no more was held in Castel's case supra than that no factual basis had been laid by the applicant therein to justify the Court finding that applicant had a legitimate expectation of a hearing. In Minister of Local Government and Land Tenure v Inkosinati supra at 238 F - H Goldin JA stated as follows :

> "The judgment of Corbett CJ in the case of Administrator, Transvaal (supra) clearly enlarges the scope, application and concept of the audi alteram partem doctrine. In Castel's case the Court (at 801) declined the invitation to consider the concept of "legitimate expectation". But even in that case Hefer JA said that where "beneficial disposition" is involved the audi alteram partem principle does not apply unless

> there are other reasons calling for its observance. In my view the Appellant's consent does not constitute a "beneficial disposition" and, even if it does, there are other reasons justifying the observance of the doctrine. In any event, the approach of Hefer JA is restrictive and does not accord with the tests set out by Corbett CJ, with which I respectfully agree."

I would accordingly respectfully align myself with the views of Didcott J in Hlongwa's case supra to the effect that the views and personal circumstances of the applicant in such a case are relevant and ought to have been taken into consideration. There is no doubt to my mind that the applicant is adversely affected by the decision to transfer him to Mount Frere. The decision, if implemented, will entail his translocation to a town which is 100 kilometres further away from his home, wife and family at Kentane than is his present station at Umtata. This town has been chosen by respondent chiefly for that very reason: to ensure that applicant will be less tempted to devote his time and energy to his night school at Kentane in alleged contravention of the provisions of section 26 of the Public Service Act. Implicit also in the decision to transfer him to Mount Frere is a rejection of applicant's averments concerning the alleged ill-health of his wife. And yet on neither of these issues which concerned the existence or not of a factual situation was applicant afforded a hearing prior to the decision to transfer him being taken. As appears from the facts set out above the applicant denies in the strongest terms that he is guilty of a contravention of the provisions of section 26 averring that he is involved therein on a charitable basis. It also seems to me, with respect to the Attorney-General, Mr. Reebein and Mr. Tantsi, that they were somewhat precipitate in coming to the conclusion, without having heard the applicant, that applicant's perceived dereliction of duty from July 1991 was a direct consequence of his activities in relation to the school when such school was only to be opened in February 1992. That may or may not later turn out to be the case once the facts are known. It may or may not also later appear to respondent that applicant's averments concerning the ill-health of his wife are true. As I have said, prima facie the medical reports annexed by applicant to his replying affidavit corroborate his claim in this regard. But whatever

conclusions may or may not be reached by respondent it seems to me that they can only properly be reached after respondent has heard the applicant's side of the story. Having heard applicant respondent may still be of the opinion that it is necessary in the public interest to transfer him out of the offices of the Attorney-General but he may no longer be of the opinion that it is necessary to transfer him to Mt Frere.

Mr Alkema's final submission was that even if it were to be held that applicant had a legitimate expectation of being afforded a hearing the principles of natural justice were complied with by respondent in that applicant made representations, firstly in regard to his transfer to Butterworth and secondly, in response to the decision to transfer him to Mt Frere.

In my view this contention cannot be upheld. The representations by applicant concerning his transfer to Butterworth did not, for obvious reasons, relate in any way to his possible transfer to Mt Frere. Although applicant later made "representations" to respondent in response to the decision to transfer him to Mt Frere these "representations" were obviously made after the decision to transfer applicant had already been taken. In Traub's case, supra at 750 B - F Corbett C.J. stated

> "Generally speaking, in my view, the audi principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (see Blom's case supra at 668 C - E; Omar's case supra at 906F; Momoniat v Minister of Law & Order & Others 1986 (2) SA 264 (W) at 274 B-D). Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken (see Omar's case supra at 274 E - 275C). This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken. but the present

> is, in my opinion, not such a case. There is no suggestion that the decision whether or not to appoint the respondents to the posts applied for by them had to be taken in a hurry: in fact all the indications are to the contrary. Nor is there any basis for concluding that for some other reason a hearing prior to the decision was not feasible".

On the facts of the present case there is no basis for concluding that any exceptional circumstances existed which justified the respondent affording applicant a hearing only after the decision to transfer him had been taken.

I am, therefore, unpersuaded by Mr Alkema's submissions in this regard.

In my view therefore the application must succeed. Both parties agree that costs should include the costs of two counsel.

Accordingly paragraphs 4.1, 4.2 and 4.3 of the rule nisi issued on 15 May, 19[redacted] confirmed, with costs to include the costs of two counsel.

[redacted]

ACTING JUDGE OF THE SUPREME COURT.

Argued on 3rd December, 1992.
Delivered on 17th December, 1992.

Counsel for applicant: J.M.N.Poswa and M.R.Madlanga instructed by N.M.Ntsebeza & Co.
Counsel for respondent: S.Alkema S.C. and G.Beukes instructed by The Government Attorney, Transkei.