



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case Number: **126352010**

In the matter between:

STARLITES MALE CHOIR

Applicant

and

CAPE MALAY CHOIR BOARD

Respondent

JUDGMENT DELIVERED ON 01 MARCH 2012

SABA, AJ

Introduction

[1] This is an application for the reviewing and setting aside of the disciplinary proceedings and the subsequent conviction and sentence of the applicant by respondent's disciplinary committee. The applicant is represented by Mr Marais. The respondent is represented by Mr Jethro.

The parties

[2] Applicant is an affiliate member of the respondent and acts as a choir. The respondent is a non profit organization for Malay Choirs and is governed by a Constitution.

[3] The following facts are common cause:

3.1 the applicant received a letter inviting it to a disciplinary hearing on two charges namely;

(a) bringing the Cape Malay Board into disrepute in terms of Lawi'1 of its Constitution;

(b) non-compliance with Law L.47 "Competition Rules and conditions;

3.2 a disciplinary hearing was held by the respondent against the applicant as a result of which the applicant was convicted on both counts and the applicant's membership was terminated with immediate effect.

[4] It was not in dispute that Mr MN Benjamin, who is a member of the applicant, approached the adjudicators and threatened to sue the South African Navy, in contravention of Law I.1, 1.4, I.9 and L.47 of the Respondent's Constitution. However, it was placed in dispute that in so doing, Mr MN Benjamin had acted on behalf of the applicant.

Factual Background

[5] Members of the South African Navy were appointed to adjudicate the 2008 grand finale (choral competition). When applicant did not win the prize known as the "Silver Fez" in the 2008 competition, Mr MZ Benjamin (the president of the applicant and Mr M. N. Benjamin, its spokesperson, were not satisfied with the findings of the adjudicators. From the correspondence received from Commandant Z G Sithole from the SA Navy, it transpired that Mr MN Benjamin contacted Mr Sithole and expressed his dissatisfaction at a variety of factors regarding the adjudication of the Grand Finale of 29 March 2008.

[6] Mr Benjamin attended an executive council meeting where this issue was addressed. The members of the executive council later investigated the matter from Commandant Z. G. Sithole, Warrant Officer R. P De Wet and Warrant Officer J. Bright and assembled evidence which was sent to the disciplinary Committee for its

attention. The applicant was later invited to appear in a disciplinary enquiry. The disciplinary hearing took place from 5 February 2009 to the 4 June 2009.

[7] Main grounds for review

- (i) The respondent failed to provide the applicant with a proper charge sheet setting out the details and particulars of the alleged transgressions committed by the Applicant.
- (ii) Respondent was unable to produce any evidence of unlawful conduct by the Applicant during the hearings.
- (iii) The conviction is without any legal or factual basis.

[8] Both counsels submitted that the provisions of the Promotion of Administrative Justice Act, No.3 of 2000, No.3 of 2000 (PAJA) are applicable in this case.

[9] Applicable Law

Section 33 (1) of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Section 3 of PAJA provides as follows:

“(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case;

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv), (v)

[10] Mr Marais submitted that no evidence of unlawful conduct was presented against the applicant during the proceedings. He submitted further that the respondent failed to take into account that Benjamin denied that he acted on behalf of the choir when he confronted the adjudicators.

[11] Mr Jethro submitted that the applicant was given proper notice of the proceedings. He further contended that at no stage during the disciplinary hearing did the applicant dispute or question the veracity of the evidence adduced at the hearing.

[12] The issues for determination are whether the applicant was informed in detail of the charge against it; whether it was given a reasonable opportunity to make representations as envisaged in section 3 (2) (ii) of PAJA and whether the conviction and sentence of the applicant was proper in the circumstances of this case.

[13] The procedure followed in the disciplinary hearing is not so easy to follow because not only the circumstances leading to the conviction and sentence of the applicant feature from the record, but also an issue regarding the suspension of the applicant formed part of the same enquiry. What is clear for purposes of this application is recorded at page 12 (from line 18) of the record of the disciplinary hearing where the following is stated:

“Mr MZ Benjamin

Before we start, why are we here?

Mr Ismail;

Where is your correspondence that was filed with you?

Mr MZ Benjamin;

Ek ken die correspondence uit my kop uit, die correspondence se, for bring the CMCB in disrepute. Now disrepute is one word, het ons gedrink, gemoord, het ons baklei, what is that, hoe kom disrepute? (sic)”

In my view, the above extract from the record is a clear indication that even though Benjamin had received the correspondence informing him of the charges that were

leveled against the applicant, it was not clear to him how or why the CMCB had been brought into disrepute.

[14] From page 13 to 16 of the record the following important information is recorded:

"...Mr Ismail read Law 1 I and Law 47 Competition rules and conditions.

Now, why were you charge of that Mr Benjamin

Executive meeting held on 2/07/2008 CMCB

Mr Benjamin reported to his club and he said that he has done this in his own capacity and they told him that they want him to proceed with this matter. Now obviously you know that the matter was with regards to MR MN Benjamin w.r.t the SA Navy. By his own admission where Starlites MVC has given him the right to proceed with the investigation at the SA Navy.

That is bringing the CMCB into disrepute. LAW L I(1).

The other 1 LAW L 47, if there was any complaints or unsatisfactory comment from starlites, you should have lodge that complain with the CMCB which you did not do. Therefore you were charge for non-compliance of Law L 47 Competition Rules and Conditions.

Mr MA Benjamin;

Wie van Starlites het ge complain?

Mr Ismail;

What we saying, if you had any complaints

Mr MZ Benjamin

But we never had a complain, that's why he never approached any executive

Mr Ismail;

You gave Mr MN Benjamin the permission

Mr MZ Benjamin;

Who gave him permission?

Mr Ismail;

Starlites

Mr MZ Benjamin;

Where?

Mr Ismail;

I just read it to you now.

Mr MZ Benjamin;

Now that what you are saying we as Starlites gave permission to Mr MN Benjamin to proceed with the investigation.

Mr Ismail;

Yes, that is what Mr MN Benjamin reported this to the CMCB on the 2nd July 2008

Mr MZ Benjamin;

We differ with you. If that would have happened, yoy as the CMCB should have write to us (SIC) and say that we have just heard by Mr Benjamin that Starlites gave him permission for doing what he has done, Here is the entire executive and they must say did we discuss this in our meetings

Mr Ismail;

First time I hear about this.

Mr MZ Benjamin;

You people had to write to Starlite and pull Starlite over the coal and bring it in the month of July/August. So the point is this, you just write letters and write to the club you bringing the Board into disrepute".....

Evaluation

[15] Without proceeding to the other pages of the record, the above extract shows clearly that it was denied that the applicant was involved in the confrontation of the adjudicators. It was also denied that Benjamin was given permission by the applicant to investigate any dissatisfaction with the adjudicators.

[16] The fact that Benjamin asked 'what disrepute' during the proceedings, is an indication that the applicant did not understand what offence it had committed. In my view, the respondent had a duty to explain in sufficient particularity why it had leveled the charges against all the members of the choir (the applicant), instead of the individual (Benjamin) who had admitted that he acted in his personal capacity when he contravened the provisions of the respondent's Constitution. I am therefore

persuaded by the submission by Mr Marais that the respondent failed to provide the applicant with sufficient details about the charges it was facing.

[17] In **National Horseracing Authority v Naidoo** 2010 (3) SA 182 NPD at 199G-H the following is stated:

“The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against.....The tribunal is required to listen fairly to both sides and observe “the principles of fair play”.

[18] It is not clear why the respondent failed to invite the applicant's comments after Mr MN Benjamin had made allegations that he obtained permission from applicant to confront the adjudicators about the outcome of the competition. The respondent failed, in my view, to afford the applicant a reasonable opportunity to make its representations regarding this issue. It is therefore my judgment that the applicant was not afforded a proper hearing and an opportunity to correct or contradict a prejudicial statement made by Benjamin against it.

[19] In the light of what I have stated above, I conclude that the respondent failed to produce any evidence of unlawful conduct on the part of the applicant.

[20] It is important to note that the applicant was not even present when the debate relating to its conviction and sentence took place. Its voice was taken away completely and its membership was terminated without being given an opportunity to say anything regarding the matter. That was grossly and procedurally unfair. The submission by Mr Marais that the proceedings before the respondent's disciplinary hearing were not in accordance with fairness and justice has merit.

Conclusion

[21] In the result, I make the following order:

21.1 the respondent's disciplinary proceedings against the applicant and the subsequent conviction and sentence are set aside with costs.



N SABA

Acting Judge of the High Court