

IN THE LABOUR APPEAL COURT OF LESOTHO**LAC/CIV/A/07/11****LAC/CIV/A/08/11****HELD AT MASERU**

In the matter between:

MABOEE MOEKO

APPELLANT

AND**MALUTI MOUNTAIN BREWERY (PTY) LTD**

RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: MR. L. MATELA

MRS. M. MOSEHLE

Heard on: 10TH June, 2013Delivered on: 28th June, 2013**SUMMARY**

Appeal from decision of Labour Court - Right to legal representation – Respondent’s Disciplinary Code conferring representation of staff member facing disciplinary charges upon a co-worker - Purpose of the Code to confine conduct of internal disciplinary proceedings to ‘within family’ - Unlikely that intention of clause is to sacrifice fairness, where circumstances calling for legal representation to achieve procedural fairness, in favour of keeping things ‘within family’ - Disciplinary Committee retaining residual discretion to allow legal representation - Such representation not available as of right - Factors to be taken into account including nature of charge, degree of factual or legal complexity, - In casu, employer not submitting the request to for legal representation to Disciplinary tribunal regarding itself as bound by law –

*Employer refusing to entertain staff's request for outside legal representation
- Proceedings before Disciplinary Committee and its findings set aside.*

Respondent to pay costs of appeal.

JUDGEMENT

MOSITO AJ

INTRODUCTION

1. This is an appeal brought by the present appellant against the judgment of the Labour Court. The grounds of appeal are that:

“a. The learned Deputy President erred in dismissing the application without considering the exceptional circumstances that warrant legal representation in the matter.

(b) The appellant reserves the right to file further reasons/grounds of appeal”.

2. This appeal arises out of an application brought by the Appellant before the Labour Court for an order in the following terms:

“1. Dispensing with the ordinary Rules and regulations that govern the modes and times of services in the proceedings before this court.

2. A Rule Nisi be issued returnable on a time and date to be determined by the Honourable Court, calling upon the Respondent to show cause if any why the following terms shall not be made final court order”

- (a) Why the Disciplinary Enquiry contemplated by the respondent against Appellant on the 21st October 2011 shall not be stayed pending finalization hereof.
- (b) Why the Appellant shall not be granted permission to be represented by a legal representative of his choice on the date of Disciplinary Enquiry.
3. Why the respondent shall not be ordered to pay costs.
4. Granting Appellant such further and/or alternative relief.

That prayer 2 (a) operate as interim relief with immediate effect”.

THE FACTS OF THE CASE

5. The Appellant was employed by the respondent as a National Sales Manager. On 17th October 2011, he received notification of a disciplinary enquiry to be held on 21st October, 2011. The allegations levelled against him impinged on the supply of catering equipment to the respondent company purportedly under fraudulent circumstances. He averred in his founding affidavit that upon receipt of the said notification he consulted his lawyer who advised him that the nature of the charges warranted legal presentation.
6. He communicated this information to the respondent, and by its letter dated 19th October, 2011 it refused the request on the basis that the matter was internal and ***“will be dealt with internally, i.e... no legal representation will be allowed in the proceeding.”*** Respondent’s disciplinary procedures indeed only provided for representation by a co-worker of the employee’s choice. The Appellant was thus seeking the

Labour Court's intervention to order the respondent company to allow him to bring legal representation of his choice as he felt without it he would not be subjected to a fair administrative procedure. The grounds on which he based his apprehension may be summarised as follows:-

- a. that the disciplinary charge is fraught with legal technicalities;
 - b. that the hearing will just be a sham as the Chief Executive Officer,
 - c. one Anthony Grendon had threatened that if he does not resign,
 - d. he will dismiss him like he dismissed his girlfriend;
 - e. that the charges levelled against him were extracted from the computer by IT experts and he would not be in a position to cross-examine them; and
 - f. that generally, the respondent company is in the habit of dismissing employees subjected to disciplinary enquiries only for such dismissals to be declared unfair by the Directorate of Dispute Prevention and Resolution (DDPR).
7. In reaction, the respondent's Managing Director's version was that, it was the company policy to deny an employee faced with an internal disciplinary enquiry legal representation. He or she may be represented by a co-worker of his choice. He denied the existence of any legal technicalities in the enquiry to warrant legal representation, and also threatening the Appellant with a dismissal.

CONTENTIONS BY THE PARTIES

8. In his submissions, the Appellant's Counsel, Advocate Mohapi conceded that Appellant has no absolute right to legal representation at a

disciplinary hearing, but that there are circumstances where an employee would be entitled to legal representation, each case being determined on its own merits. He contended that in Appellant's circumstances, refusal to allow representation was likely to impair the fairness of the disciplinary proceedings. He submitted that the respondent company would in any event not suffer any prejudice if legal representation were allowed. He further argued that the company's disciplinary code is but a guideline and as such amenable to being departed from when circumstances so demanded as in the present case.

9. Advocate Loubser argued on behalf of the respondent that the Appellant keeps referring to *legal technicalities* but makes very vague submissions lacking in detail as to what these *legal technicalities* rendering it very difficult for the Court to make a determination. He emphasized that the Appellant does not give the nature of the legal arguments he intends to advance at the disciplinary hearing and only talks of certain preliminary legal points he intends raising. As far he is concerned, the Appellant has failed to give sufficient information why he needs legal representation. He contended that the allegations levelled against the Appellant are factual and as far as he is concerned the matter is not complex as can be ascertained from the charge sheet.

PROCEEDINGS BEFORE THE LABOUR COURT

10. The Labour Court dismissed the Appellant's case on the basis that, firstly, by and large, disciplinary procedures do not permit employees the right to be represented at disciplinary hearings by external persons, including lawyers. Representation is usually limited to a co - employee. Where the

employer's code is ambiguous it may be interpreted as including the possibility of representation by a lawyer or a union official - see *Ibhayi City Council v Yantolo (1991) 12 ILJ 1005 (E)*. The rationale behind this restriction is normally that lawyers in particular would unnecessarily complicate what is supposed to be an otherwise informal process. Workplace codes may however provide otherwise. Secondly, it held that there is generally no absolute right to legal representation during disciplinary hearings. It is only recognised in the context of Courts of law - the right to a fair trial. Thirdly, it held that, in Lesotho the law is silent on the issue. The Court argued that, in such situations, resort is had to the common law, which as aforementioned provides that there is no absolute right to legal representation at internal hearings. Courts can be and are indeed agents of change but our jurisprudence and legislative intent has been not to interfere with administrative action at the administrative level. The question of representation, she argued, has been left to the discretion of the employer, to be reasonably exercised, of course. The Court argued that we unfortunately do not have a provision in our legislation analogous to the South African position. The right to legal representation at disciplinary proceedings remains the discretion of the employer.

11. The Court held that both the Constitution and Acts of Parliament are silent on the issue. Legal representation at the DDPR is also limited. It went on to hold that, in terms of Section **228 (A) of the Labour Code (Amendment) Act, 2000**, legal representation is only permissible where the parties agree thereto or if the Arbitrator decides that it would be unreasonable to expect a party to deal with the dispute without legal representation. The Court went on to hold that, the reluctance to embrace legal

representation in labour disputes is evident from our statutes. Even at national level so the Court held, the supreme law of the land only limits the right to legal representation to criminal cases. Article 12 (1) of the Constitution of Lesotho guarantees a person charged with a criminal offence a right to be afforded a fair hearing within a reasonable time by an independent and impartial Court. The Court then concluded that the discretion to afford legal representation at disciplinary hearings rests with the employer, and that, it found itself with no alternative but to dismiss the application.

PROCEEDINGS BEFORE THE LABOUR APPEAL COURT

12. Before this Court, the Counsel for the parties argued along the same lines as they did before the Labour Court as appears above. There is therefore, no need to reiterate their contentions here save when considering them below. In advance of doing so, it is apposite to examine the applicable legal principles.

APPLICABLE LEGAL PRINCIPLES

13. The question is often asked as to what the employer should do in a case where the accused employee requests outside representation in a disciplinary hearing. The leading case on the subject is **Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee (2002) 23 ILJ 1531 (SCA)** where it was held that: "[e]ntitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention. However, as the court *a quo* correctly observed, in *Dabner v South African Railways & Harbours* 1920 AD 583 at 598 more

than 80 years ago, this court categorically denied the existence of any such absolute right."This Court followed the **Hamata's** case in **Lerotholi Polytechinc v Blandinah Lisene LAC/CIV/05/2008**.

14. In **MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani (2004) 25 ILJ 2311 (SCA)** , the Court held that: "[i]n terms of our common law a person does not have an absolute right to be legally represented before tribunals other than courts of law (*Dabner v SA Railways & Harbours 1920 AD 583 at 598*; and *Hamata* at para 5). However, it does require disciplinary proceedings to be fair and if 'in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary tribunal must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion' (per Marais JA in *Hamata* at para 23)."
15. It is trite law that proceedings at disciplinary hearings are proceedings at administrative tribunals (which are not courts of law). (See ***Dabner v South African Railways and Harbours 1920 AD 583***; ***Cuppan v Cape Display Supply Chain Services 1995 (4) SA 175 D***). Chaskalson CJ in ***Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho intervening) 2001 (3) SA 1151 (CC) at 1184 D - E*** expressed himself as follows in respect of procedural fairness before administrative tribunals:

“Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the ‘rights’ affected by it, the circumstances in which it is made and the consequences resulting from it.”

(See also *Bel Porto Governing Tribunal and Others v Premier, Western Cape, And Another 2002 (3) SA 265 (CC)*.)

16. Based upon the above principles, it is clear that there is no right to legal representation in disciplinary hearings *per se*. However, the provisions of a disciplinary code is determinative as to whether or not a discretion ought to be exercised on the issue of representation.
17. In the event that legal representation is sought, a chairperson presiding at the hearing must consider the following factors: the nature of the questions of law raised: the complexity of the matter; the comparative ability of the opposing parties or their representatives to deal with the matter; the public interest.
18. Thus, no employer may summarily refuse workers to be assisted by legal representatives in disciplinary investigations against workers. What this means is that, presiding officials at disciplinary hearings must in future give hearing to and consider a worker's request for legal representation in terms of common law and "with a view to give the worker a fair disciplinary hearing". A chairperson will have the obligation to exercise his discretion to accept legal representation at the disciplinary hearing.
19. It must be borne in mind that, the right to legal representation at disciplinary hearings is not a material requirement of natural justice, but in complex cases natural justice might require the employee to be represented by a legal representative. The word "complex" in its ordinary adjectival form means complicated; and "complicated" means intricate; and "intricate" means "very complicated"(See *The Oxford Concise English Dictionary, 10th Ed*). I agree with Parker, A P in **Kurtz v Nampost Namibia Limited and Another [2006] NALC 5** that 'from the ordinary grammatical

meaning of “complex”, ... a “complex” issue or problem or matter means the issue, problem or matter is not easy to comprehend or deal with because it contains many-sided and difficult aspects. And whether an issue, problem or matter is intricate cannot be determined in a vacuum: it depends largely upon the subject matter involved and the level of understanding of the individual faced with the issue, problem or matter, such understanding having been gained through formal or informal education and developed through experience.’

20. It is therefore not invariably necessary for an employee to be legally represented at a disciplinary hearing in order for the employer to comply with the *audi alteram partem* rule and, the common law does not acknowledge the right to legal representation but recognises fair administrative action that will vary in different cases. If the chairman still refuses the worker to appoint his/her own legal representative, the worker has the option to approach the Labour Court with a request for an urgent interdict for the disciplinary hearing to be discontinued until he/she (the worker) has a chance to take the chairman’s decision to the Labour Court.
21. In the light of authorities mentioned hereinbelow, I am persuaded that there may be exceptional and appropriate circumstances warranting a departure from a Disciplinary Code and that, a disciplinary code is not intended to be peremptory in its terms but rather to provide a guideline and that employers should generally only be allowed to depart from a code in exceptional or appropriate circumstances.(See in this regard: ***Solidarity/MWU on behalf of Van Staden v Highveld Steel and Vanadium and Another* (2005) 26 ILJ 2045 (LC)** at para 14).In ***SA Tourism Board v CCMA and Others* [2004] 3 BLLR 272 (LC)**. I may add that it is unlikely that

this Court will hold that legal representation can never be permitted under any circumstances even where the Code states that 'external legal representation is not permitted'.

22. Although a practice had developed that employees are not entitled to legal representation in disciplinary proceedings, this practice has come into question over recent years. In the case of ***The MEC: Department of Finance, Economic Affairs and Tourism: Northern Province v Schoon Godwilly Mahumani[2005] 2 All SA 479 (SCA) at para 9-13***, the South African Supreme Court of Appeal had to consider an appeal against a finding that the respondent was entitled to legal representation at a disciplinary hearing. At issue in that case was clause 8 of the Disciplinary Code and Procedures for the Public Service which stated that neither the employer nor the employee may be represented by a legal practitioner unless the employee is a legal practitioner. Patel AJA held as follows:

'In the *Mosena* case it was submitted that, in the light of clause 2.8, clause 7.3(e) of the Code should not be construed as an absolute prohibition against legal representation at a disciplinary hearing. Wallis AJ held that clause 2.8 is an injunction in regard to an employer's general approach to discipline and should not be interpreted as authorising wholesale discretionary departures from the Code and procedures. It should be interpreted to only authorise departures where it would be necessary by agreement or otherwise, to depart in some respect from the strict terms of the procedure. He found in clause 2.7, which provides that disciplinary proceedings do not replace or imitate court proceedings, a strong indication that the parties considered clause

7.3(e) to be a fundamentally important portion of their agreement.’

I agree with Wallis AJ that clause 2.8 is an injunction as to the general approach that should be followed. I, furthermore agree, that clause 7.3(e) is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation (see *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA) at paras 12 and 13).

In terms of our common law, a person does not have an absolute right to be legally represented before tribunals other than courts of law (*Dabner v SA Railways and Harbours* 1920 AD 583 at 598; and *Hamata* at para 5). However, it does require disciplinary proceedings to be fair and if ‘in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary tribunal must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion’ (per Marais JA in *Hamata* at para 23). The provisions of the Promotion of Administrative Justice Act in respect of administrative action in general corresponds with the common law in respect of disciplinary proceedings.

The parties, who agreed on the Code, were intent on devising a fair procedure (see clause 2.4) and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended the presiding officer to have a discretion to allow legal representation in circumstances in which it

would be unfair not to do so. I can find no indication in the Code to the contrary. There is, therefore, no justification for interpreting 'appropriate circumstances' in clause 2.8 so as not to include circumstances, which would render it unfair not to allow legal representation at a disciplinary enquiry.

It follows that, if, on a conspectus of all the circumstances it would be unfair not to allow legal representation the provisions of clause 7.3(e) may in terms of clause 2.8 be departed from. The presiding officer erred in holding that he had no discretion to allow such a departure. The court *a quo*, therefore, correctly reviewed his decision and set it aside.'

23. Thus, there may be circumstances where the complexity level of the case is high and where the consequences of an adverse finding could be serious. There would be no significant prejudice to the employer if legal representation would be allowed; the employee's ability to deal with the case is low in comparison to that of the employer.
24. This in turn means that employers will need to ensure that their presiding officers are highly skilled in chairing disciplinary hearings. This is so as to be able to make the right judgement as to whether to allow legal representation or not and also to be able to deal with the legal challenges posed by attorneys and advocates at disciplinary hearings. Having accepted that the Panel had a discretion to allow external legal representation, it must now be considered whether the Ruling of the Panel was reasonable.

OUGHT THE LABOUR COURT HAVE INTERFERRED ON THE SIDE OF THE APPELLANT?

25. Turning to the appeal before us, the first question to consider is whether there is sufficient indication in clause 1.3.1 of the **Disciplinary and Grievance Procedures** of the respondent's Manual that any residual discretion on the part of the Disciplinary tribunal was intended to be excluded. (See *Libala v Jones No and The State 1988 (1) SA 600 (C) at 604A -Dladla and Others v Administrator, Natal, and Others 1995 (3) SA 769 (N) at 775J - 776B and 776J*).
26. The English case of *Pett v Greyhound Racing Association Ltd [1968] 2 All ER 545* is apposite here. In that case, the rules applicable to the domestic enquiry to be held did not specifically exclude legal representation, just as the respondent's rule under clause 1.3.1 of the **Disciplinary and Grievance Procedures** does not. Lord Denning MR at 549 B-G states the following:

Counsel for the defendants says that the procedure is in the hands of the stewards. If they choose to say: "We will not hear lawyers", that is for them, he says, and it is not for the courts to interfere.

I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. ...

Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. ... If justice is to be done he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?

27. In the present case similarly, clause 1.3.1 of the **Disciplinary and Grievance Procedures** does not expressly exclude legal representation. The fact that a member of staff's entitlement to representation has not been qualified is in itself a sufficiently strong indication of an intention not to exclude a residual discretion to allow representation of a different kind in appropriate circumstances. That does not however mean that, permission to be represented by a lawyer who is not a member of staff is to be had simply for the asking. It is for the Disciplinary tribunal to consider any such request in the light of the circumstances which prevail in the particular case.
28. As Chaskalson CJ once put it in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC)* at **1184E**, ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it. In doing so, the employer's legitimate interest in keeping disciplinary proceeding 'within the family' is of course also to be given due weight, but it cannot be allowed to transcend all else no matter how weighty the factors in favour of allowing of legal representation may be.
29. On the present facts, Appellant received a disciplinary hearing notification on 17 October 2011. On 19 October 2011 he was told that he would not be permitted legal representation. This was clearly before the contemplated date of hearing.
30. In **Lerotholi Polytechinc v Blandinah Lisene** (*supra*), this Court put the issue as follows:

There is no indication that the Staff Disciplinary Committee itself as a tribunal, ever considered the request to permit legal representation. There is no indication in the report of proceedings that the Staff Disciplinary Committee itself ever considered the request to legal representation. The chairperson ought to have put the matter to the committee for the exercise of its discretion as such power reposes in the committee at common law and not the chairperson. Mr Letsika argued that this was a deficiency in the taking of the minutes. There was however no factual basis for this submission.

31. In the present case, there is no record or transcript of the disciplinary proceedings. What is clear from the record of proceedings in this appeal, is that denial of legal representation was made (not by the disciplinary tribunal) even before the contemplated date of disciplinary hearing. This is clear from the letter written by one Ms M. Kemeng dated 19 October 2011.
32. The issue whether this denial was reasonable must have been considered by the Labour Court in order to determine whether or not it was unreasonable. In considering the reasonableness of the ruling, the Court must consider whether the Disciplinary tribunal failed to consider an important and relevant factor or whether it considered an irrelevant factor which it should have ignored and whether the it failed to apply its mind in accordance with relevant laws or principles. This, the Labour Court did not do. Had it done so, it would have determined whether or not in the first place, the Disciplinary tribunal ever considered the question at all.
33. The need to consider the issues presented by the applicant before the Labour Court became more pressing when regard is heard to the fact that, the appellant's case was that he had informed the respondent that his

case was going to be complex according to what he had been told by his legal representative. He himself had even told his legal representative that he would not be able to handle issues relating to deprivation of privacy: issues of information technology and cross examination of experts in that regard. Before the Labour Court, all these issues were present. They had been pleaded *al beit* in an inelegant fashion. In my opinion, in elegance *per se* in pleading should not be the basis for failing to address relevant issues when such issues have been pleaded in the papers. These issues pleaded by the applicant ought to have been considered by the Labour Court in order to determine the reasonableness of the refusal by the respondent to allow legal representation.

34. Furthermore, In order to evaluate the reasonableness of the ruling it was necessary for the Labour Court to consider the circumstances that led to the application for legal representation.
35. As mentioned previously, one must not lose sight of the fact that clause 1.3.1 of the **Disciplinary and Grievance Procedures** of the respondent's Manual does not specifically exclude legal representation. What it seeks to do, is to inform the employee that he is entitled to representation by a co-worker. That was also the applicable rule in *Hamata (Supra at 455B)*., which provided: "The student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon." the Supreme Court of Appeal in that case held that the rule was not intended to prohibit altogether representation by lawyers in disciplinary enquiries, so long as the lawyer involved is a student or staff of the Technikon. Thus, the total exclusion of lawyers as such could not have been the object of clause 1.3.1 of the **Disciplinary and Grievance Procedures** the respondent's Manual.

CONCLUSION

36. In our view, the Labour Court ought to have considered the above issues and determined the reasonableness of the refusal. This Court was informed by Counsel for the parties that, there is an ongoing battle at the DDPR whereat the Appellant is seeking to have his dismissal by the Respondent at the very disciplinary inquiry whose disciplinary tribunal was never given an opportunity to consider his request for legal representation overturned. We were also informed that the Arbitrator was awaiting the finalization of these appeals.
37. In the light of that information, it is not in the interests of justice to remit this matter to the Labour Court to consider those issues mentioned herein which it ought to, but did not consider. Bearing in mind that it is the residual discretion of the disciplinary tribunal to consider the issue whether or not to grant the request to legal representation, the justice of this case will best be met by nullifying the disciplinary proceedings and enabling the disciplinary tribunal to exercise its discretion whether or not to permit legal representation. The question whether or not the employer will decide to institute proceedings *de novo* before the disciplinary tribunal is left to the employer. We therefore leave it open. In view all the foregoing circumstances, the following order is made:
- a. The appeal succeeds with costs
 - b. The decision of the Labour Court is set aside and replaced with the following order: “the Applicant’s application is granted in terms of prayers 2(b) and 3.”
 - c. Flowing from paragraphs (a) and (b) above, and in line with prayer 4 of the Notice of Motion, the disciplinary

proceedings proceeded with against the Appellant are hereby nullified.

38. This is a Unanimous decision of the Court,

K.E. MOSITO AJ.
Judge of the Labour Appeal Court

For the Applicant Adv. P.L. Mohapi

For the Respondent Adv. P.J. Loubser